2007

Bodell Construction Company, a Utah corporation v. Mark H. Robbins and Bank Rone, Utah, National Association, a Utah Corporation; and Does 1 through 50 : Brief of Appellee

Utah Court of Appeals

James S. Jardine; Matthew L. Lewis; Ray, Quinney and Nebeker; James S. Lowrie; Andrew G. Deiss; Jones, Waldo, Holbrook and McDonough; Attorneys for Defendant.
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IN THE UTAH COURT OF APPEALS

BODELL CONSTRUCTION COMPANY, Appellant, v. MARK H. ROBBINS; CHEROKEE WALKER & INVESTMENT COMPANY, CHEROKEE & WALKER, L.L.C., BANK ONE, UTAH, NATIONAL ASSOCIATION, and DOES 1-50, Appellees.	**ADDENDUM 2** **BRIEF OF APPELLEE JPMORGAN CHASE BANK, N.A., SUCCESSOR TO BANK ONE, N.A.** Appellate Case No. 20070951-CA

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ADDENDUM 2
BRIEFING REGARDING BANK ONE'S SUMMARY JUDGMENT MOTION

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IN THE THIRD JUDICIAL DISTRICT COURT IN AND FOR

SALT LAKE COUNTY, STATE OF UTAH

BODELL CONSTRUCTION COMPANY, a Utah corporation, Plaintiff, vs. MARK H. ROBBINS; BANK ONE, UTAH, NATIONAL ASSOCIATION, a national banking association, and DOES 1 through 50, Defendants.	**MOTION OF JPMORGAN CHASE BANK, N.A. FOR PARTIAL SUMMARY JUDGMENT ON FRAUD CLAIM** Case No. 030917018 Honorable John Paul Kennedy **ORAL ARGUMENT REQUESTED**

Pursuant to Rule 56 of the Utah Rules of Civil Procedure, Defendant JPMorgan Chase Bank, N.A., successor by merger to Bank One, Utah, National Association ("Bank One") moves for partial summary judgment on Plaintiff Bodell Construction Company's fraud claim.

The fraud claims of Bodell Construction Company ("Bodell") are based upon Bodell's alleged reliance on a letter dated August 22, 2000 purportedly sent by Ben Lightner of Bank One. There are genuine issues whether the letter is authentic and was signed by Mr. Lightner. However, even if the letter is authentic and was signed by Mr. Lightner, Bodell cannot recover on its fraud claim because the undisputed evidence establishes that Bank One did not know, and had no reason to expect, that statements allegedly attributable to Bank One would reach Bodell and influence its conduct. Bodell cannot establish the intent-to-induce-reliance element of its fraud claim.

In support of this Motion, Bank One submits the accompanying Memorandum of Points and Authorities, which is filed and served herewith.

DATED this 29th day of November, 2006.

John A. Beckstead
Tyler L. Murray
Emily V. Smith
Snell & Wilmer L.L.P.
Attorneys for Defendant JPMorgan Chase Bank, N.A successor to Bank One, Utah, National

CERTIFICATE OF SERVICE

I hereby certify that I mailed a true and correct copy of the foregoing **MOTION OF JPMORGAN CHASE BANK, N.A. FOR PARTIAL SUMMARY JUDGMENT ON FRAUD CLAIM**, postage prepaid, this 29th day of November, 2006 to the following:

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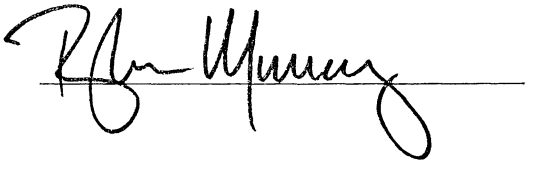

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IN THE THIRD JUDICIAL DISTRICT COURT IN AND FOR

SALT LAKE COUNTY, STATE OF UTAH

BODELL CONSTRUCTION COMPANY, a Utah corporation, Plaintiff, vs. MARK H. ROBBINS; BANK ONE, UTAH, NATIONAL ASSOCIATION, a national banking association, and DOES 1 through 50, Defendants.	**MEMORANDUM IN SUPPORT OF MOTION OF JPMORGAN CHASE BANK, N.A. FOR PARTIAL SUMMARY JUDGMENT ON FRAUD CLAIM** Case No. 030917018 Honorable John Paul Kennedy **ORAL ARGUMENT REQUESTED**

Pursuant to Utah Rule of Civil Procedure 56(c), Defendant Bank One, Utah National Association ("Bank One") respectfully submits this Memorandum in Support of Motion for Partial Summary Judgment on Plaintiff's fraud claim.

PROCEDURAL BACKGROUND

On September 18, 2006, hearing was held on the Motion to Amend filed by Bodell Construction Company ("Bodell"). The Motion sought leave to add a claim for fraud against JPMorgan Chase Bank, N.A., successor by merger to Bank One, Utah, National Association ("Bank One"). Bank One opposed the Motion to Amend on the ground that the proposed claim failed to state a claim on which relief could be granted and therefore the amendment would be futile. The Motion to Amend was granted but the Court also ordered that any motions for summary judgment on the newly added fraud claim be filed by November 30, 2006. This Motion for Partial Summary Judgment is filed in response to that order.

SUMMARY

Plaintiff Bodell Construction Company claims that it was fraudulently induced to loan $4 million to Marc Jenson based on statements contained in a letter dated August 22, 2000 that was purportedly written by Bank One. Ben Lightner, the purported author of the August 22, 2000 letter, testified in his deposition that he questions the authenticity of his signature and of the letter. There are genuine issues of fact as to whether the letter is authentic and signed by Mr. Lightner. However, even if it is determined that the August 22, 2000 letter is authentic and was signed by Mr. Lightner, Bodell cannot recover on a fraud claim against Bank One as a matter of law.

The only evidence concerning the intended recipients of the alleged August 22, 2000 letter is the testimony of Mark Robbins. This undisputed evidence establishes that, if the August

22, 2000 letter is authentic, it was intended solely for Lincoln Partners in connection with a transaction in which a company owned by Mark Robbins, called MadTrax Group LLC ("MadTrax"), was attempting to purchase the Mongoose Bicycle Division from Brunswick Corporation.

Bodell's theory is that Bank One is liable to Bodell (and to anyone who might have seen this letter) regardless of whether Bank One knew about Bodell or the Bodell loan. The law, however, does not extend liability for fraud this far. Instead, to hold Bank One liable for fraud, Bodell must prove, by clear and convincing evidence, that Bank One intended the letter to reach Bodell, or that Bank One had reason to expect that the letter would reach Bodell and influence his conduct.

The undisputed evidence in this case proves that Bank One had no such intent or expectation. Bank One did not know, and had no reason to expect, that this letter would find its way from Mark Robbins, to Marc Jenson, and finally to Bodell, who would purportedly use it as the basis for lending money to Jenson. In fact, Bank One had no knowledge that Bodell even existed or that there was to be a loan by Bodell. As a result, Bank One is entitled to summary judgment on Bodell's fraud claim.

STATEMENT OF UNDISPUTED FACTS

A. Mark Robbins and His Bicycle Businesses

1. In the late 1990's, defendant Mark Robbins became involved in the bicycle business. In 1998, Mark Robbins and others formed Wasatch Cycle, Inc. ("Wasatch Cycle"),

which designed, sold and distributed bicycles to LDS missionaries. Deposition of Mark Robbins ("Robbins Dep.") 40-45, 49. (Annexed as Exhibit 1).

2. Around 2000, Mr. Robbins started a company known as Vtrax Sports LLC ("Vtrax Sports"). Vtrax's plan was to sell and distribute bicycles through various distribution channels. It obtained a license agreement from Icon to put names like ProForm, NordicTrack, and HealthRider on bicycles and attempted to distribute the bicycles through large mass-merchandisers like Sears and Wal-Mart. Robbins Dep. 59-60; 67-70.

3. Also in 2000, Mr. Robbins founded a company called Madwagon LLC, which attempted to sell bicycles on college campuses and via the Internet. Robbins Dep. 76.

B. The Potential Mongoose Acquisition and the August 22, 2000 Letter

4. In the summer of 2000, Mark Robbins also began pursuing an opportunity to buy the Mongoose Bicycle Division from Brunswick Corporation. Mr. Robbins formed a company called MadTrax Group LLC ("MadTrax") to pursue this acquisition. He sent letters on behalf of MadTrax confirming its interest in the acquisition. Robbins Dep. 81; 194-95; July 11, 2000 Letter from MadTrax to Brunswick (annexed as Exhibit 2); July 13, 2000 Letter from MadTrax to Brunswick (annexed as Exhibit 3).

5. In response, Brunswick required MadTrax to agree to maintain the confidentiality of the materials Brunswick provided to enable MadTrax to evaluate the Mongoose Bicycle Division. July 13, 2000 Confidentiality Letter Agreement (annexed as Exhibit 4).

6. In addition, on August 9, 2000, Lincoln Partners, the investment banking firm representing Brunswick in the sale of the Mongoose Division, sent a letter to Trevor Larson,

MadTrax CFO, asking for, among other things, "a description of your sources and level of financing for the proposed transaction." August 9, 2000 Letter from Lincoln Partners to Trevor Larson (annexed as Exhibit 5).

7. Mr. Robbins was a client of Bank One's private banking services. Bank One employee Ben Lightner was Mr. Robbins' private banker. Mark Robbins testified that in August 2000, he had conversations with Mr. Lightner about the fact that "Lincoln Partners and all of the investment bankers were, you know, looking for verification of funding and stuff like that." Robbins testified that he asked Mr. Lightner to draft a letter for Lincoln Partners regarding potential funding sources for MadTrax. Robbins Dep. Robbins Dep. 308-310; 316-17; 324-25.

8. One of Robbins' potential funding sources for the Mongoose acquisition was a loan from Arimex Investments, Ltd. ("Arimex"), and Robbins had discussions with Arimex about a potential loan.[1] Robbins Dep. 255-267.

9. Robbins claims that Lightner produced the August 22, 2000 letter in response to this request. The letter reads:

> To: Whom it May Concern
>
> Re: Mad Trax Group, LLC
>
> MadTrax Group, LLC (the "Company") and its individual members Mark Robbins and Marc Jenson (the "Members") will be depositing $165,000,000 into Bank One, Utah NA. The funding is coming from a loan agreement between MadTrax Group, LLC, a Utah limited liability company and Arimex Investments, LTD., a Bahamian corporation The sum of $165,000,000 will be deposited into an interest bearing account in the name of the Company and managed by its Members.

[1] Robbins also sought funding from Unisource Capital and GE Capital Robbins Dep 199-203

Should you have any questions with respect to this matter, please contact the Undersigned.

Ben Lightner
Wealth Advisor
Private Banking Group

August 22, 2000 Letter (Annexed as Exhibit 6).[2]

10. Mark Robbins' testimony makes clear that the August 22, 2000 letter was intended for Lincoln Partners in connection with the proposed Mongoose acquisition, and was not intended for other potential investors or for use in any other transaction. Under examination, Mr. Robbins testified:

> Q: You told Mr. Lightner that you needed a letter like this to show potential investors as evidence of, you know, your financial backing.
>
> A: Potential investors—its Lincoln Partners.
>
> ***
>
> Q: And what do you remember discussing with Ben Lightner about what use you intended to make of this letter?
>
> A: That the letter was being used for Lincoln Partners and – I mean we were having to do verifications and all that kind of stuff through that period.
>
> ***
>
> Q: Was it your intention in obtaining a letter like this that you would show it to potential investors as needed?
>
> A: No. I mean, I don't recall that, but I mean, this letter was intended for Lincoln Partners.

[2] Lightner testified that he was "unable to say either way" whether he wrote the August 22 letter but noted that his signature looked strange. Deposition of Benjamin Lightner ("Lightner Dep.") 239 (annexed as Exhibit 7). No copies of the August 22 Letter or any other evidence of the letter, or any of the other letters described in Bodell's Memorandum, have been found in the files of Bank One.

***

Q: When you asked for this letter, was it your intention that be shown to anyone other than Lincoln Partners?

A: No.

Robbins Dep. 324; 326-327; 446.

11. On September 27, 2000, Lincoln Partners informed Trevor Larson that Brunswick "would like to invite [MadTrax] to submit a proposal to acquire [Mongoose.]" September 27, 2000 Letter from Lincoln Partners to MadTrax (annexed as Exhibit 8).

12. MadTrax hired Duff & Phelps to assist in its efforts to bid for the Mongoose Division, but despite help from Duff & Phelps, and despite making several offers for Mongoose ranging from $63 million to $76.6 million, MadTrax was not the winning bidder and was therefore unable to make the purchase. Robbins Dep. 200-03; October 10, 2000 Letter from MadTrax to Lincoln Partners (annexed as Exhibit 9); November 3, 2000 Letter from MadTrax to Lincoln Partners (annexed as Exhibit 10); November 8, 2000 Letter from MadTrax to Lincoln Partners (annexed as Exhibit 11).

13. There is no other evidence in the record concerning the intent or expectation of Bank One concerning the August 22, 2000 letter (assuming the letter is authentic).

C. Robbins Agrees to Purchase Cherokee & Walker LLC's Interest in Wasatch Cycle, Madwagon, and Vtrax

14. In 2000, around the same time he was working on the potential Mongoose transaction, Mark Robbins was also working on a transaction through which he would purchase

the 50% interest in Wasatch Cycle, Madwagon, and Vtrax owned by Cherokee & Walker LLC ("Cherokee & Walker"). Robbins Dep. 145, 150-52.

15. Cherokee & Walker had purchased their 50% interest on January 7, 2000 in exchange for a $4.5 million loan and a $500,000 capital contribution. January 7, 2000 Membership Interest Purchase Agreement (annexed as Exhibit 12).

16. By June 10, 2000, Mr. Robbins and Cherokee & Walker had negotiated an agreement through which Robbins would repurchase Cherokee & Walker's 50% interest for approximately $8 million. June 10, 2000 Purchase and Settlement Agreement (annexed as Exhibit 13); Robbins Dep. 172-73.

17. Robbins needed to borrow or raise the $8 million to pay Cherokee & Walker, and ultimately identified an individual named Marc Jenson as a potential source of funds for the Cherokee & Walker buyout. Robbins Dep. 182-83.

D. Marc Jenson and the Bodell Construction Loan

18. Jenson was in the business of borrowing funds, and then loaning those funds to others. Jenson makes a profit on the difference between the interest he must pay to borrow the money and the interest he receives from lending the money. Deposition of Marc Jenson ("Jenson Dep.") 305 (annexed as Exhibit 14).

19. In mid-2000, Jenson met Robbins and learned that Robbins needed $8 million to buy out Cherokee & Walker's interest. After negotiations, Jenson agreed to loan Robbins the $8 million. Jenson Dep. 43-46; 48.

20. Jenson's plan was to fund the Robbins loan with $4 million of Jenson's own money and $4 million from someone else. Accordingly, Jenson approached Mike Bodell, of Bodell Construction Company, about the possibility of loaning Jenson $4 million that Jenson would, in turn, loan to Robbins for the Cherokee & Walker buyout. Jenson Dep. 72-73; 102; Deposition of Michael J. Bodell ("Bodell Dep.") 42-45 (annexed as Exhibit 15).

21. Jenson testified he received a copy of the August 22, 2000 letter from Robbins. Jenson, however, had no discussions with Robbins regarding what Jenson intended to do with the letter. Jenson Dep. 215-16; Robbins Dep. 329.

22. Jenson likewise recalls no discussions with Lightner, or anyone else at Bank One, about the letter and was not involved in requesting that it be drafted. Nevertheless, as part of the discussion between Jenson and Bodell, Jenson provided a copy of the August 22, 2000 letter to Bodell. Jenson Dep. 187, 215-16, 219, 227; Bodell Dep. 49-50.

23. On August 30, 2000, Bodell Construction Company loaned $4 million to MSF Properties, LC (a company owned by Marc Jenson) and obtained a personal guaranty from Jenson. Bank One was not a party to this loan. August 30, 2000 Promissory Note (annexed as Exhibit 16); August 30, 2000 Guaranty (annexed as Exhibit 17) (collectively the "Bodell Loan").[3]

E. No Relationship Whatsoever Between Bank One and Bodell

24. At the time of the August 22, 2000 letter, Bodell had no relationship whatsoever with Bank One—it was not a customer and it had no accounts at Bank One. Bodell does not

even know who Bank One employee Ben Lightner is. And before making the loan to Jenson, Bodell never contacted Mr. Lightner or anyone else at Bank One. Bodell Dep.11-12, 56; Deposition of Merrill L. Weight ("Weight Dep.") 62, 65 (annexed as Exhibit 18); Bodell Response to Bank One Request for Admission No. 2 (annexed as Exhibit 19).

25. Similarly, while Lightner was aware that Robbins and Jenson had some sort of business relationship, Lightner recalls no discussions about Jenson loaning Robbins $8 million in connection with his bicycle business. Lightner Dep. 39.

26. Bank One knew nothing about Bodell, or the loan that Bodell planned to make to Jenson, and had no discussions with Jenson about Bodell Construction or Michael Bodell. Lightner Dep.39; 205; 259.

27. Indeed, when asked directly about whether he knew where Marc Jenson was getting money to loan to Robbins so that Robbins could buy out Cherokee & Walker, Lightner responded that he had "no idea." Lightner further testified that "I wouldn't know [Bodell] if he walked in here today." Lightner Dep. 259.

F. Jenson Fails to Timely Repay the Bodell Loan, and Bodell Sues Bank One

28. Jenson failed to repay the Bodell Loan. First Amended Compl. ¶ 18.

29. Bodell has now sued Bank One, claiming that it was fraudulently induced to loan money to Jenson based on the August 22, 2000 letter. First Amended Compl. ¶¶ 15-16; 29-35.

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[3] The terms of the Bodell Loan required Jenson to pay a loan fee of $80,000 and to pay interest of 1% per week, or 52% per year. Bodell Dep. 19-20.

ARGUMENT

A. Summary Judgment Standard for a Fraud Claim

On a motion for summary judgment, the moving party bears the initial burden of proving that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law. *See Jenson v. IHC Hosps., Inc.*, 944 P.2d 327 (Utah 1997). However, "in opposing a motion for summary judgment, the plaintiff still has the ultimate burden of proving all the elements of his or her cause of action." *See id.* at 339. "Once challenged, the party who opposes such a motion must come forward with sufficient proof to support his or her claim." *See id.*

A plaintiff like Bodell, who is pursuing a fraud claim, bears an even heavier burden. The Utah Supreme Court requires that "the elements of fraud . . . be proven by 'clear and convincing evidence.'" *Crookston v. Fire Ins. Exch.*, 817 P.2d 789, 800 (Utah 1991). This burden applies at the summary judgment stage, meaning that a plaintiff "must be able to prove each element of fraud by clear and convincing evidence" to prevail at summary judgment. *Andalex Resources v. Myers*, 871 P.2d 1042, 1046 (Utah Ct. App. 1994). *See also Applied Genetics Int'l, Inc. v. First Affiliated Secur., Inc.*, 912 F.2d 1238, 1243 (10th Cir. 1990) (holding that "the clear and convincing standard must be considered in determining whether defendant's motion for summary judgment should have been granted on the fraud claim").

B. Bodell Cannot Establish the Intent-to-Induce Reliance Element of it Fraud Claim

To prevail on its fraud claim, Bodell must prove the following elements by clear and convincing evidence: (1) that a representation was made (2) concerning a presently existing fact

(3) which was false and (4) which the representor either (a) knew to be false or (b) made recklessly, knowing that there was insufficient knowledge upon which to base such a representation, (5) for the purpose of inducing the other party to act upon it, and (6) the other party, acting reasonably and in ignorance of its falsity, (7) did in fact rely upon it (8) and was thereby induced to act to that party's injury and damage. *Gold Standard, Inc. v. Getty Oil Co.*, 915 P.2d 1060, 1066-67 (Utah 1996). Here, Bodell cannot prevail on its fraud claim against Bank One because the undisputed evidence negates the intent-to-induce reliance element of Bodell's fraud claim.

To show that Bank One intended to induce Bodell's reliance on the August 22, 2000 letter, Bodell must show that Bank One specifically intended to induce Bodell to rely on the letter, or that Bank One had some reason to expect that Bodell would act in reliance on the letter in a certain type of transaction:

> One who makes a fraudulent misrepresentation is subject to liability to the persons or class of persons whom he intends or has reason to expect to act or to refrain from action in reliance upon the misrepresentation, for pecuniary loss suffered by them through their justifiable reliance in the type of transaction in which he intends or has reason to expect their conduct to be influenced.

Restatement (Second) of Torts § 531. *See also Blodgett v. Martsch*, 590 P.2d 298, 301 (Utah 1978) (plaintiff must prove that defendant "knowingly misrepresented a material fact with intent to induce the plaintiff to act or refrain from action").

Under the Restatement, "if the maker [of the misstatement] neither intends nor has reason to expect that the misrepresentation will reach a particular person or class of persons or that they

will act or refrain from acting in reliance upon it, the fact that it does reach them and they do so act does not [subject the maker to liability for fraud]." *Id.* at Comment b.

This is because "[v]irtually any misrepresentation is capable of being transmitted or repeated to third persons, and if sufficiently convincing may create an obvious risk that they may act in reliance on it." *Id.* at Comment d. This obvious risk, however, is not sufficient to hold a defendant liable for fraud. *Id.* Indeed, it is not even enough that the defendant recognizes, or as a reasonable man should recognize, the risk that the misrepresentation will be communicated to third parties and that they may act upon it. *Id.*

Instead, there must be facts showing that the defendant had some reason to conclude that it was especially likely that the alleged misrepresentation would reach the plaintiff and influence its conduct:

> The maker of a misrepresentation must have information that would lead a reasonable man to conclude that there is an especial likelihood that it will reach those persons and will influence their conduct. There must be something in the situation known to the maker that would lead a reasonable man to govern his conduct on the assumption that this will occur.

Id.

Utah law is consistent with the Restatement provisions. For example, in *Ellis v. Hale*, 373 P.2d 382, 385 (Utah 1962), one defendant made a fraudulent statement to another defendant, who in turn repeated the fraudulent statement to the plaintiff. The court dismissed the fraud claim because there was no allegation that the defendant who made the alleged fraudulent statement intended for it to be transmitted to the plaintiff. *Id.*

Similarly, courts in other jurisdictions have held that when a party makes a misrepresentation about another's financial condition, it cannot be held liable to all third parties who might come across the misrepresentation and rely on it. For example, in *Ernst & Young LLP v. Pacific Mutual Life Insurance Company*, 51 S.W.3d 573 (Tex. 2001), the plaintiff, an institutional investor, sued an auditor for fraud in connection with plaintiff's purchase of approximately $8.5 million worth of notes. *Id.* at 576. The auditor moved for summary judgment based on evidence showing that it did not specifically intend for the plaintiff to rely on the audit report. In response, the plaintiff put on evidence from financial experts showing that international accounting firms like the defendant knew and expected that people would rely on their audit report letters to make investment decisions. Nevertheless, the Texas Supreme Court sustained summary judgment in favor of the auditor on the plaintiff's fraud claim because there was no evidence showing that the auditor specifically intended for the note purchasers to rely on the audit report—despite its general knowledge that people might rely on the audit report. *Id.* 576, 582. *See also Great Plains Trust Co. v. Morgan Stanley Dean Witter & Co.*, 313 F.3d 305, 323-26 (5th Cir. 2002) (affirming trial court's judgment on the pleadings on plaintiff's fraud claim because the allegations in the complaint failed to show that defendant Morgan Stanley intended its allegedly fraudulent opinion letter to reach the plaintiff debenture holders); *In re Worldcom Sec. Litig.*, Case No. 02 Civ. 3288(DLC))3 Civ.1785, 2006 WL1047130 (S.D.N.Y. April 21, 2006) (dismissing fraud claims because there were no allegations of any special communications with defendants or any particular facts giving rise to inference that defendants

had information showing an especial likelihood that plaintiff would rely on their public statements).

Here, the undisputed evidence proves that Bank One had no information that would lead it to conclude that the alleged misrepresentations in the August 22, 2000 letter would reach Bodell and cause him to loan money to Marc Jenson.

The evidence establishes that:

- The August 22, 2000 letter (if authentic) was intended solely for Lincoln Partners in connection with MadTrax's efforts to buy the Mongoose Bicycle Division of Brunswick Corporation. It was not intended for some unspecified class of potential investors for use in any transaction they might undertake. Robbins Dep. 324; 326-327; 446.
- Robbins and Jenson never told Ben Lightner, or anyone else from Bank One (i) that the August 22, 2000 letter would be provided to anyone other than Lincoln Partners; (ii) that Robbins was trying to obtain funds to buy out Cherokee & Walker, or (iii) that Jensen was trying to obtain money from Bodell that he would, in turn, loan to Robbins to buy out Cherokee & Walker. Lightner Dep. 39; 259; Jenson Dep. 187; 215-219; 227, 229.
- Although Robbins allegedly gave a copy of the August 22, 2000 letter to Jenson, Jenson never told Robbins what he intended to do with the August 22, 2000 letter, so there was no way for Robbins to know that Jenson was going to show it to Bodell. Jenson Dep. 225-26; Robbins Dep. 329, 437.
- Bodell never told Bank One that it was contemplating a loan to Jenson based on the August 22, 2000 letter. In fact, Bodell had no relationship whatsoever with Bank One—

it was not a customer and it had no accounts at Bank One. Bodell does not even know who Bank One employee Ben Lightner is. And before making the loan to Jenson, Bodell never contacted Mr. Lightner or anyone else at Bank One. Instead, Bodell dealt only with Jenson in deciding to make the loan. Bodell Dep.11-12, 55-56; Weight Dep. 62, 65; Bodell Response to Bank One Request for Admission No. 2.

In short, Bank One knew nothing about Bodell or the Bodell loan transaction. There is no evidence to show that, assuming the letter is authentic, Bank One had any reason to expect that the August 22, 2000 letter—which was specifically intended for Lincoln Partners—would later be provided to Jenson and would be used by Jenson to raise funds from Bodell in a completely different transaction. As a result, Bank One cannot be liable to Bodell for fraud.

Bodell has argued in this case that Lightner's general understanding that there was some business relationship between Jenson and Robbins, and that Lightner's memory of taking checks to Cherokee & Walker (though he does not recall taking any to Cherokee & Walker for Robbins or Jenson) (Lightner Dep. 40-41) is enough to satisfy the "reason to expect" standard. But such general, vague assertions of business dealings are not enough. *See, e.g., Ernst & Young LLP v. Pacific Mutual Life Insurance Company*, 51 S.W.3d at 576, 582 (auditor's general understanding that investors rely on audited financial statements was not enough to show that the auditor has reason to expect that the plaintiff would receive and rely on the audit report).

Indeed, this case is identical to the example provided in the Restatement — literally a textbook example — of a situation where Bank One cannot be liable to Bodell:

> A [Bank One] [allegedly] makes fraudulent statements concerning the financial standing of B [MadTrax Group LLC, Robbins, and Jenson] to C [Robbins] and asks him to repeat them to D [Lincoln Partners] for the purpose of inducing D [Lincoln Partners] to [sell the Mongoose Bike Division] to B [MadTrax Group LLC, Robbins, and Jenson]. A [Bank One] does not intend and has no reason to expect that C [Robbins] will repeat the statements to anyone other than D [Lincoln Partners]. C [Robbins] repeats them to [Jenson, who in turn,] repeats them to E [Bodell], who relies upon the statements and extends credit to B [Jenson]. A [Bank One] is not liable to E [Bodell] under the rule stated in [Restatement (Second) of Torts § 531].

Restatement (Second) of Torts § 531 illus 2. (modified).

Instead, Bank One must have had information "that would lead a reasonable man to conclude that there is an especial likelihood that [the August 22, 2000] letter [would] reach [Bodell] and influence [his] conduct." Restatement (Second) of Torts § 531 cmt. d. Lightner's general understanding that there may be some business relationship between Jenson and Robbins, does not show, by clear and convincing evidence, that Bank One understood there was an "especial likelihood" that the August 22, 2000 letter would be provided to Robbins, then to Jenson, and then finally to Bodell in connection with a loan transaction between Bodell and Jenson.

C. Lack of a Specific Addressee in the Letter Is Not Sufficient Evidence

Bodell contends that the reason-to-expect standard is satisfied because the August 22, 2000 letter was addressed "To whom it may concern" and Bank One's witnesses acknowledged that there is a risk that any number of people might rely on such a letter. But the law is clear that "even an obvious risk that a misrepresentation might be repeated to a third party"—such as a letter addressed "To whom it may concern"—is "not enough to satisfy the reason-to-expect

standard." *Ernst & Young LLP v. Pacific Mutual Life Insurance Company*, 51 S.W.3d at 576, 582; Restatement (Second) of Torts § 531 cmt. d. Moreover, this is not a case in which the August 22, 2000 letter, if authentic, was written for a class of potential lenders, of which Bodell was a member. Instead, the testimony establishes that the letter was intended specifically for Lincoln Partners and no one else. Robbins Dep. 324; 326-327; 446. The fact that the letter was addressed "To whom it may concern" does not establish that Bank One intended to induce Bodell—or anyone else like him—to rely on the letter. As a result, Bank One cannot be liable to Bodell for fraud.

CONCLUSION

There is no evidence that Bank One intended, or had any reason to expect, that the purported August 22, 2000 letter would be provided by Robbins to Jenson, and then by Jenson to Bodell, who would rely on it in making a loan to Jenson. To the contrary, the undisputed evidence proves that, if the letter is authentic, Bank One did not intend or have any reason to expect the letter would be shown to anyone other than Lincoln Partners in connection with Robbins' efforts to buy Mongoose. Bank One is therefore entitled to summary judgment on Bodell's fraud claim.

DATED this 29th day of November, 2006.

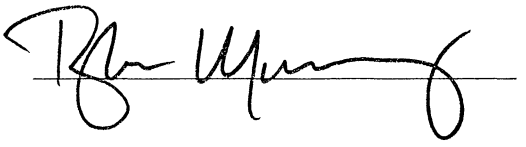
John A. Beckstead
Tyler L. Murray
Emily V. Smith
Snell & Wilmer L.L.P.
Attorneys for Defendant JPMorgan Chase Bank, N.A. successor to Bank One, Utah, National

CERTIFICATE OF SERVICE

I hereby certify that I mailed a true and correct copy of the foregoing **MEMORANDUM IN SUPPORT OF MOTION OF JPMORGAN CHASE BANK, N.A. FOR PARTIAL SUMMARY JUDGMENT ON FRAUD CLAIM**, postage prepaid, this 29th day of November, 2006 to the following:

Robert Shelby
Burbidge & Mitchell
Parkside Tower
215 South State, Suite 920
Salt Lake City, Utah 84111

David W. Tufts
Durham Jones & Pinegar
111 E. Broadway, Suite 900
Salt Lake City, Utah 84111



Tab 3

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Attorneys for Plaintiff

ORIGINAL

IN THE THIRD DISTRICT COURT,

SALT LAKE COUNTY, STATE OF UTAH

BODELL CONSTRUCTION COMPANY, a Utah corporation Plaintiff, vs. MARK H. ROBBINS; CHEROKEE & WALKER INVESTMENT COMPANY, L.L.C., a Utah limited liability company; CHEROKEE AND WALKER, L.L.C., a Utah limited liability company; JPMORGAN CHASE BANK, N. A., a National Association; and DOES 1 through 50, Defendants.	**PLAINTIFF BODELL CONSTRUCTION COMPANY'S MEMORANDUM IN OPPOSITION TO MOTION OF JPMORGAN CHASE BANK, N.A. FOR PARTIAL SUMMARY JUDGMENT ON FRAUD CLAIM** Civil No. 030917018 Judge John Paul Kennedy

Plaintiff Bodell Construction Company ("Bodell") will respond in this memorandum to the arguments asserted by Defendant JPMorgan Chase Bank, N.A. ("Chase") in support of its Motion for Partial Summary Judgment dismissing Bodell's fraud claim.

INTRODUCTION

In the year 2000, Mark Robbins ("Robbins") attempted to raise funds to purchase Cherokee & Walker's ownership interest in one of his bicycle businesses. Marc Jenson ("Jenson"), who was involved with Robbins in his businesses, was attempting to raise funds to loan to Robbins to acquire

Cherokee & Walker's ownership interest. Benjamin Lightner ("Lightner"), a wealth advisor in Bank One's private banking group, was a personal friend of Robbins and had detailed knowledge concerning Robbins' businesses. Among other things, Lightner was aware that Cherokee & Walker was a part owner of at least one of Robbins' companies and that Robbins was going to buy out Cherokee & Walker's ownership interest. Robbins was also attempting to purchase the bicycle division of Brunswick Corporation. Robbins kept Lightner fully informed of his activities in those enterprises.

Lightner authored on Bank One letterhead an August 22, 2000 letter addressed "To Whom It May Concern" in order to assist Robbins and Jenson in their fund-raising efforts. In that letter, Lightner falsely stated that Robbins, Jenson and their company, MadTrax Group, LLC, would be depositing $165 Million into Bank One, which funding was coming from a loan between MadTrax and Arimex Investments, Ltd. and that the amount would be deposited into an interest-bearing account at Bank One in the name of the company. This letter was absolutely false. As Lightner admitted in his deposition, there was no basis for the statement that a $165 Million deposit would be made into Bank One for Robbins and Jenson.

Jenson solicited Bodell to loan him $4 Million for the purpose of allowing Jenson in turn to loan the $4 Million to Robbins to acquire Cherokee & Walker's ownership interest. Jenson represented to Bodell that the loan would be promptly repaid, and in order to induce Bodell to make the loan Jenson gave Bodell's President, Michael Bodell, a copy of the August 22 Bank One letter signed by Lightner. Acting in reliance on the Bank One letter, Bodell did in fact make the loan and it was not repaid.

Bank One has now filed a motion for partial summary judgment asking the court to dismiss Bodell's fraud claim against it on the sole basis that Bank One did not intend Bodell to rely on

Lightner's August 22 letter and could not reasonably have anticipated that Bodell would do so. This motion should be denied. There is substantial evidence that Lightner knew that Robbins was going to acquire Cherokee & Walker's interest in at least one of Robbins' companies; that Robbins did not have the assets to repurchase Cherokee & Walker's interest; that Robbins was seeking a source to loan him funds for that purpose; and that Lightner intended the letter to be shown to any potential financiers either of the Cherokee & Walker acquisition or of Robbins' efforts to acquire Brunswick bicycle division. There are clearly unresolved questions of fact and the jury must determine the reliance issue at trial after hearing and weighing the strength of the testimony and other evidence.

RESPONSE TO CHASE'S RECITATION OF PROCEDURAL HISTORY

Chase informs the Court its motion for partial summary judgment is filed in response to an Order from the Court requiring Chase to file by November 30, 2006 any motions pertaining to Bodell's common law fraud claim. The Court made no such order. [*See* Order Regarding Plaintiff's Motion for Leave to Amend and Motion to Compel, attached hereto as Exhibit A.] To the contrary, the Court has twice instructed Defendants in open court to file one consolidated motion for summary judgment. As the Court explained at our January 6, 2006 law and motion hearing:

> The Court: Somebody said in their papers they were expecting to file several motions for summary judgment and I'm not pointing finders, but I will let you know that I will not let you do that. You've got one summary judgment Motion that I'm going to let you file, I don't care who it is that's going to file it. You get one bite at the apple and rules of page limitations apply and I'm really tough about expanding because if I give it to one then I end up giving it to the other and before I know it, I end up with another 10 more volumes with, you know, a lot of it just being regurgitated of prior stuff. So I'm just letting you know about that right now while I'm thinking about it.
>
> ...
>
> Mr. Beckstead (for Chase): Thank you for that heads up.

[Transcript of January 6, 2006 Law and Motion Hearing Transcript at 46-47, relevant portion of which is attached hereto as Exhibit B] Bodell assumes Chase has elected to file the instant motion as its one and only summary judgment motion, per the Court's instructions.

RESPONSE TO CHASE'S STATEMENT OF UNDISPUTED FACTS

For the purposes of this motion only, Bodell does not dispute the undisputed facts stated by Chase in its memorandum except that Bodell does dispute the following facts:

Paragraph 10. Bodell does not dispute that Robbins testified that he asked Lightner to write the August 22, 2000 letter for Lincoln Partners. However, Bodell does dispute the accuracy of that testimony. As set forth in Bodell's statement of additional material facts, the letter was addressed "To Whom It May Concern" and was not intended for Lincoln Partners. In fact, Lincoln Partners never received the letter. Lightner wrote a different letter to Lincoln Partners dated October 19, 2000, which was properly and directly addressed to Rob Brown at Lincoln Partners. That letter was received by Lincoln Partners and formed the basis for at least one telephone call between Lightner and Lincoln Partners concerning Lightner's authorship of the letter and the accuracy of Lightner's representations therein. [Letter attached hereto as Exhibit C.] As detailed more fully below, a reasonable jury could find that the August 22, 2000 letter addressed "To Whom It May Concern" was intended to be shown to the class of potential financiers for Robbins' business dealings.

Paragraph 13. There is evidence in the record concerning the intent or expectation of Bank One concerning the August 22, 2000 letter, which is set forth in Bodell's Statement of Additional Material Facts below.

Paragraph 21. Although Robbins self-servingly testified that he had no discussions with Jenson concerning what Jenson intended to do with the August 22, 2000 letter, Jenson did not so testify. Moreover, based upon the evidence set forth below, a reasonable jury could determine that it was agreed and understood between Robbins and Jenson that Jenson would utilize the letter to assist in his efforts in raising financing for Robbins to purchase Cherokee & Walker's interest in Robbins' companies. Indeed, there was no other reason for Robbins to give the letter to Jenson, particularly if the letter was intended only for Lincoln Partners, as Chase contends.

Paragraph 25. Lightner was aware of much more than the fact that Robbins and Jenson "had some sort of business relationship." Lightner knew Robbins and Jenson were friends and partners who were so close they often did deals on the strength of a mere handshake. [Lightner Deposition, attached hereto as Exhibit D, at 199:11-21] Lightner also knew that Robbins and Cherokee & Walker were business partners; that Cherokee & Walker owned a part of at least one of Robbins' companies; and that Robbins was going to buy out Cherokee & Walker's ownership interest. [*Id.* at 42:2-4; 107:20 - 108:5; and 259:16 - 260:16] In fact, Lightner believes he was present when Robbins had discussions with Cherokee & Walker about loans Bank One made to Vtrax, their joint venture. [203:11-21]

As evidenced by Bank One's refusal to loan additional money to Robbins in 2000 after reviewing his financial information, Lightner and Bank One also knew that Robbins did not have the resources to repurchase Cherokee & Walker's interest, and that Robbins would have to borrow the money. Lightner even remembers taking checks to Cherokee & Walker at the direction of Robbins or Jenson. [*Id.* at 40:17 - 41:3] Lightner knew Robbins received money from Jenson in 2000, testified he did not know what Robbins did with the money, but stated Robbins may have paid off Cherokee &

Walker because Lightner knew Robbins was purchasing Cherokee and Walker's interest in the company they jointly owned. [*Id.* at 259:16 - 260:11]

STATEMENT OF ADDITIONAL MATERIAL FACTS

1. During the year 2000, Benjamin Lightner ("Lightner") was employed by Bank One as a wealth adviser in Bank One's private banking group. [Lightner Depo. at 10:8-13]

2. In 2000, Lightner was Bank One's number one private banker in the nation in total sales. [*Id.* at 179:1-21]

3. Lightner was the private banker for Mark Robbins ("Robbins") and Marc Jenson ("Jenson"). [*Id.* at 111:03 - 115:07] Lightner had frequent and regular communications with Robbins during 2000. [*Id.* at 10:14-17][1]

4. Lightner knew that Robbins and Jenson were partners who did business deals on a handshake. [*Id.* at 199:24 - 200:3]

5. Robbins was a personal friend of Lightner's and offered Lightner a job while Lightner was employed by Bank One. [*Id.* at 320:1-7; 109:19 - 110:2]

6. When Lightner left Bank One in late 2000 to take a job at Irwin Union Bank, he took Robbins and Jenson with him as clients. [*Id.* at 83:24 - 84:1; 114:11-15 and 115:14-17]

7. In the summer and fall of 2000, Bank One was "terming" Jenson out of some loans. Bank One required a rest period when the line-of-credit needed to be at a zero balance and he had not done that. [*Id.* at 270:25 - 271:17]

---

[1] Lightner testified as Chase's 30(b)(6) corporate representative in this case. [Lightner Depo. at 6:20-7:1]

8. Lightner characterized Bank One's relationship with Robbins in August 2000 as a growing relationship. [*Id.* at 320:19-25]

9. Before Bank One would make a loan to a client, it would gather financial and business information which would be sent to the National Credit Center where it would be analyzed. After that, Lightner had the option of signing off on the transaction. [*Id.* at 274:1 - 275:2]

10. If Bank One was going to do a loan for a client in 2000, Bank One did due diligence to find out about the borrower including what their credit report looked like, how their cash flow looked, what the company did, and how the company operated. [*Id.* at 144:18-24]

11. During 2000, Robbins and his companies had loans with Bank One, including a $200,000 line-of-credit. [*Id.* at 261:17 - 262:5]

12. In connection with the loans made by Bank One to Robbins, Bank One received his personal financial statements and tax returns. [*Id.* at 187:20-25]

13. Lightner understood that Robbins was associated with Vtrax, Madwagon, Wasatch Cycles and MadTrax Group and received personal financial statements and tax returns in connection with extending Robbins' credit. [*Id.* at 186:9 - 187:7]

14. In 2000, Bank One knew who owned Vtrax and Vtrax Sports based upon the documentation received by the bank in connection with extensions of credit. [*Id.* at 196:22 - 197:4]

15. Lightner understood that Cherokee & Walker owned part of at least one of Robbins' companies. [*Id.* at 107:20 - 108:5] In fact, Cherokee & Walker and Robbins co-guaranteed a Bank One loan to one of the companies. [*Id.* at 191:20 - 193:3] Bank One would have known which of Robbins' companies Cherokee & Walker had an ownership interest in based upon the documentation

received by the bank. [*Id.* at 193:19-24] Lightner had meetings with Cherokee & Walker and Robbins talking about what the company was doing. [*Id.* at 203:11-16]

16. In the summer of 2000 Robbins sought to reacquire a 50 percent interest Cherokee & Walker owned in their joint bicycle venture. [Deposition of Mark Robbins, attached hereto as Exhibit E, at 145, 150-52]

17. Lightner understood that Robbins was acquiring Cherokee & Walker's interest and that Cherokee & Walker therefore wanted the loan it had guaranteed closed out. [Lightner Depo. at 310:1-5]

18. Lightner wrote a letter on Bank One letterhead to Jim Jenkins, a principal at Cherokee & Walker, dated July 3, 2000 in which he referred to "Shane" who was Shane Perry with Cherokee & Walker. [*Id.* at 308:4-19; Letter attached hereto as Exhibit F] That letter stated in part:

> Mr. Jim Jenkins
> Cherokee & Walker, LLC
> 1245 East Brickyard Rd. #350
> Salt Lake City, Utah 84106
>
> Dear Mr. Jenkins:
>
> The purpose of this brief letter is to confirm my verbal conversation with Shane that the following has occurred:
>
> 1) All loan documents using the name of James W. Jenkins, Cherokee & Walker, LLC or Cherokee & Walker Investment Co., LLC (both signed and unsigned) relating to Vtrax Sports, LLC have been permanently destroy.
> 2) Cherokee & Walker, LLC, Cherokee & Walker Investment Co., LLC and/or James W. Jenkins are not currently co-signers/guarantors on any loan with Bank One in connection [sic] Vtrax Sports, LLC.
>
> If I can be of any further assistance, please feel free to contact me at (801)481-5020.

Sincerely,

Benjamin Lightner
Wealth Advisor

19. Lightner knew Robbins received money from Jenson in 2000, testified he did not know what Robbins did with the money, but stated that Robbins may have paid off Cherokee & Walker because Lightner knew that Robbins was purchasing Cherokee & Walker's interest in the company they jointly owned. [*Id.* at 259:16 - 260:11] Lightner obtained that information from either Robbins or Cherokee & Walker. [*Id.* at 260:12-16]

20. Lightner remembered taking checks to Cherokee & Walker at the direction of Robbins or Jenson. [*Id.* at 40:17 - 41:3]

21. Lightner was aware in 2000 that Robbins was also interested in acquiring the bicycle division of Brunswick Corporation, including the Mongoose Company. [*Id.* at 11:2-8]

22. Bank One declined any financing for Robbins and his companies with respect to the Mongoose acquisition because Robbins did not have the necessary resources. [*Id.* at 217:10 - 218:7]

23. Lightner was personally involved in the efforts of Robbins and Jenson to acquire Mongoose Bicycles from Brunswick. Among other things, as detailed below, he wrote letters at Robbins' request falsely representing the financial strength of Robbins and Jenson and their companies. Lightner also attended a meeting with Robbins and Arimex Investments, a potential lender for the Brunswick deal. [*Id.* at 35:17 - 36:6 and 156:3-8]

24. Robbins kept Lightner informed of "everything that was going on" with respect to the Mongoose deal and potential financing. [Robbins Depo. at 326:17-20; 330:5-7; and 331:13-15]

25. As evidenced by the August 22, 2000 letter and other letters described below, Lightner was well aware that Jenson and Robbins were working together to raise funding for the deal, and Lightner remembers having had discussions with Robbins about financing for it. [Lightner Depo at 37:5-17]

26. As detailed below, Lightner authored at least four letters on Bank One letterhead for Robbins in which Lightner made statements he admits were false at the time the letters were written. Lightner also created a Form Verification of Deposit for Robbins falsely stating the value of Robbins' accounts with Bank One. Lightner neither confirms nor denies that he wrote any of the letters, but as detailed below, the sworn testimony of third-party witnesses independently ties Lightner to each of the letters.

27. The first of the false letters Lightner drafted on Bank One letterhead is a letter dated July 27, 2000 to Brunswick Corporation. [*Id.* at 219:2-6; Letter attached hereto as Exhibit G] That letter stated:

> James Schenk
> Vice President
> Brunswick Corporation
>
> Dear Mr. Schenk:
>
> MadTrax Group, LLC (the Company) and several members of management have been long-time customers with Bank One, Utah , NA (Bank One). Over the years, Bank One and the Company have partnered together to complete several successful business transactions.
>
> Based on our discussions with the management of the Company, we confirm that the Company has the financial resources to complete the acquisition of the bicycle segment of Brunswick Corporation. Bank One is interested in the potential opportunity to

finance the purchase of certain acquired assets. The management of the Company has established several significant lines of credit with Bank One.

Please call me at (801) 481-5020 if you have any questions.

Sincerely,

Ben Lightner
Bank One, Utah, NA
Relationship Manager[2]

This letter was false. Bank One had not had a long-term relationship with Robbins, Jenson and MadTrax Group. [*Id.* at 219:25 - 220:8] MadTrax Group had not even been formed yet and had not been a long-time customer of Bank One, nor had the management of MadTrax Group been a long-time customer of Bank One. [*Id.* at 220:16 - 222:7] In fact, Bank One did not even know for sure who the management of MadTrax Group was at the time the letter was written. [*Id.* at 221-4-7] The statement that Bank One and MadTrax Group had partnered to complete several transactions was also false. [*Id.* at 222:8-12]

28. In fact, as of July 2000, Bank One knew, contrary to Lightner's representations in the letter, that MadTrax Group did not have the financial resources to acquire Mongoose. [*Id.* at 222:3-7]

29. It was also not true in July 2000 that Bank One was interested in any opportunity to finance the purchase of Mongoose by MadTrax Group or its management. [*Id.* at 222:21-25]

30. Lightner next wrote an August 22, 2000 letter addressed "To Whom It May Concern." [Letter attached hereto as Exhibit H] In the letter, Lightner states:

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[2] Lightner did not deny that he wrote this letter and testified he did not know if he wrote the letter or not. [*Id.* at 224:4-15]

Re: MadTrax Group, LLC

Gentlemen:

MadTrax Group, LLC (the "Company") and its individual members Mark Robbins, and Marc Jenson (the "members") will be depositing $165,000,000 into Bank One, Utah NA. The funding is coming from a loan agreement between MadTrax Group, LLC, a Utah limited liability company and Arimex Investments, LTD., a Bahamian corporation. The sum of $165,000,000 will be deposited into an interest bearing account in the name of the Company and managed by its Members.

Should you have any questions with respect to this matter, please contact the Undersigned.

Ben Lightner
Wealth Advisor
Private Banking Group[3]

The statement in the letter that $165,000,000 would be deposited into Bank One was false and there was no basis for that statement. [*Id.* at 238:19 - 241:12 and 325:1-17]

31. Lightner wrote the August 22, 2000 letter at Robbins' request. [Robbins Depo. at 322:22 - 324:13]

32. Lightner gave the "To Whom It May Concern" letter to Robbins who gave it to Jenson. [Deposition of Marc Jenson, attached hereto as Exhibit I, at 216:1-3] Jenson gave the letter to Michael

---

[3] Lightner did not deny that he wrote this letter but testified that because the letter was false he didn't think he wrote the letter even though it was faxed from Bank One's Broadway branch where he worked. [*Id.* at 238:19 - 241:12] Chase acknowledges in its memorandum that whether Lightner wrote the letter presents a question of fact that must be resolved at trial. Overwhelming evidence will establish that Lightner did in fact write the letter, including the testimony of Defendant Robbins that he requested and received the letter from Lightner, and the testimony of disinterested third-parties that they discussed with Lightner the other letters described herein containing similar (and in some instances, identical) misrepresentations.

Bodell, Bodell's President, as part of his solicitation for Bodell to lend $4 Million to Robbins. [*Id.* at 215:16-25]

33. Arimex never deposited $165,000,000 into Bank One and Bank One never became an escrow agent to hold that money. [Lightner Depo. at 242:3 - 246:10]

34. Lightner understood that an employee of Bank One should not address a letter "To Whom It May Concern" because you are uncertain who might read it and rely on it. [*Id.* at 255:24 - 256:4]

35. Chase acknowledges that writing a letter addressed "To Whom It May Concern" is inappropriate and a violation of standard practice in the banking industry. [Deposition of Susan Mayo, as Chase's Rule 30(b)(6) designee, attached hereto as Exhibit J, at 95:16 - 96:7] Chase concedes "you don't generate 'to whom it may concern' letters at all in standard practice." [*Id.* at 104:2-4]

36. Chase acknowledges that such a letter is against standard practice in the industry because there exists a risk that any person could claim to be "to whom it may concern." [*Id.* at 98:11 - 100:13]

37. Despite having record of other letters and correspondence from Robbins, MadTrax Group and Lightner on behalf of Bank One, Lincoln Partners, whom Bank One contends was the intended recipient of the August 22, 2000 letter, does not have the letter in its files and the investment bankers at Lincoln Partners who worked on the Brunswick deal know nothing about it. [Deposition of Robert Brown, attached hereto as Exhibit K, at 73:6-12; Deposition of David Houser, attached hereto as Exhibit L, at 51:20 - 52:5]

38. Lincoln Partners, the investment banker for Brunswick, does have in its files and did receive a different letter Lightner authored on Bank One letterhead dated October 19, 2000, addressed

to Robert Brown at Lincoln Partners. [Lightner Depo. Ex. 215 and 225:20 - 226:4; Letter attached hereto as Exhibit M][4]

39. Lightner's October 19, 2000 letter to Lincoln Partners stated:

> Rob Brown
> Vice President
> Lincoln Partners LLC
> 181 West Madison Street Suite 3750
> Chicago, Illinois 60602
>
> Dear Mr. Brown:
>
> MadTrax Group, LLC (the "Company") and its individual members collectively have on deposit with several financial institution [sic] including cash, government bonds and marketable securities valued in excess of $971,716,000, of which $165,000,000 will be deposited into Bank One, Utah, NA (Bank One) by December 1, 20000. Bank One has received copies of all personal financials, tax returns, marketable securities, government bonds, and pertinent documents to conclude and verify the value of the MadTrax Group, LLC and its individual members.
>
> Based on our recent discussions, and additional financial information provided by the management of the Company, we confirm that the Company has the financial resources in place to complete the acquisition of Brunswick Bicycles, with a purchase price of $63,000,000.
>
> Should you have any questions with respect to this matter, please contact the undersigned.
>
> Benjamin M. Lightner
> Bank One, Utah, NA
> Wealth Advisor
> (801) 481-5020[5]

---

[4] Again, Lightner would not deny that he wrote this letter, but because the content of the letter was false he says he would not have written the letter. [Lightner Depo. at 226:5-14]

[5] The handwriting on Exhibit M was placed there by David Houser, a Senior Vice President with Lincoln Partners, during a telephone conversation with Lightner about the letter. [Houser Depo. at 38:17 - 41:8]

40. Robert Brown with Lincoln Partners spoke with Lightner who confirmed he had written the letter, that the information contained in the letter was true and that MadTrax had the ability to finance the purchase of Mongoose. [Brown Depo. at 81:12 - 82:11 and 55:22 - 56:8]

41. David Houser with Lincoln Partners testified that Lightner confirmed in telephone conversations the financial wherewithal of Robbins and his companies to do the transaction. [Houser Depo. at 15:11 - 18:9]

42. In fact, the information contained in the October 19, 2000 letter was false, as Lightner admitted. [Lightner Depo. at 225:20 - 229:25]

43. Among other things discussed above, it was not true in October of 2000 that Bank One was expecting $165 Million to be deposited by December 1, 2000. [*Id.* at 229:1-25]

44. In October 2000, it was untrue that MadTrax and its members had cash bonds and securities in excess of $971 Million. [*Id.* at 227:14-19] It was not true that principals of MadTrax Group had the funding to purchase Mongoose. [*Id.* at 225:7-13] It was not true that money would be deposited from Arimex. [*Id.* at 227:20 - 228:2]

45. Nor was it true in October of 2000 that Bank One had received copies of personal documents to verify the value of the MadTrax Group and its individual members. [*Id.* at 230:5-21]

46. Finally, Lightner authored another letter on Bank One letterhead dated October 19, 2000, this one directed to the Union Bank of Switzerland ("UBS") and addressed to "Ladies and Gentlemen." [Letter attached hereto as Exhibit N] Lightner's October 19, 2000 letter to UBS stated:

> Union Bank of Switzerland
> Bahnhofstrasse 45
> Zurich, 8001

Switzerland
41-1-234-1111

Re: MadTrax Group, LLC

Ladies and Gentlemen:

MadTrax Group, LLC (the "Company") and its individual members collectively have on deposit with several financial institution [sic] including cash, government bonds and marketable securities valued in excess of $971,716,000, of which $165,000,000 will be deposited into Bank One, Utah, NA (Bank One) by December 1, 20000. Bank One has received copies of all personal financials, tax returns, marketable securities, government bonds, and pertinent documents to conclude and verify the value of the MadTrax Group, LLC and its individual members.

Upon the execution of the Agreement between the Company and the Union Bank of Switzerland, Bank One will establish a $100,000,000 ("Custodial Account") in accordance with the provisions of the Agreement and the usage of the Companies funds to activate the account.

Should you have any questions with respect to this matter, please contact the undersigned.

Benjamin M. Lightner
Bank One, Utah, NA
Wealth Advisor
(801) 481-5020

47. Michael Peterson, at the time a Vice President with Merrill Lynch, spoke with Lightner in a telephone conversation within a day or so of the date of the letter, in which Lightner confirmed he had written the UBS letter and vouched for the accuracy of the representations in it. [Deposition of Michael Peterson, attached hereto as Exhibit O, at 38:1 - 39:4; 34:25 - 38:4 and 24:12 - 25:19]

48. Bank One did not do any due diligence with respect to the "To Whom It May Concern letter" or any of the other letters authored by Lightner. [Lightner Depo. at 250:18-23]

49. Lightner and Bank One understood that consumers and businesses have an expectation that if banks make representations in letters the banks will first do their due diligence to make sure the representations are correct and that if a bank makes a representation in correspondence that a transaction will occur, the bank is obligated to do due diligence to ensure the representation is true and accurate. [*Id.* at 25 - 26:14 and 30:8-13] Further, when a bank makes a representation in written correspondence about the net worth or assets held by one of its customers, Lightner acknowledged that the bank has the same duty. [*Id.* at 30:8-25] Lightner acknowledged that he understood that when he authored a letter telling someone that a Bank One customer had a certain amount of money in the bank that the recipient would rely upon that representation. [*Id.* at 95:20 - 96:8]

ARGUMENT

A. THE RELIANCE ISSUE PRESENTS A QUESTION OF FACT THAT THE JURY MUST RESOLVE AT TRIAL.

Chase erroneously argues that Bodell's common law fraud claim must be dismissed because Bodell cannot prove that Bank One specifically intended to induce Bodell to rely on the August 22 letter or that Bank One had reason to expect that Bodell would act in reliance thereon. To the contrary, there is substantial evidence that Lightner wrote the letter in order to assist Robbins and Jenson in their fund-raising efforts and that Bodell was within the class of persons - - potential financiers - - to whom the letter was directed or to whom Bank One could reasonably expect would receive the letter. The reliance issue is clearly for the jury to decide at trial.

Chase argues that Bodell cannot show that Bank One intended to induce Bodell's reliance on the August 22 letter because Lightner claims he did not even know of Bodell and because Robbins

testified in his deposition that he requested Lightner draft the August 22 Letter to give to Brunswick's investment banker, Lincoln Partners. These arguments are without merit and have been rejected by courts considering them.

First, the fact that Chase claims Lightner did not intend that the representations contained in the letter be given specifically to Bodell is unimportant.[6] The letter was written "To Whom It May Concern," not Lincoln Partners or any other specific person or entity. A reasonable jury could easily conclude on that basis alone that the letter was written to assist the efforts of Robbins and Jenson and their companies in their contemplated business transactions and/or to raise money in order to purchase Cherokee & Walker's interest in the companies it owned jointly with Robbins and to fund the purchase of Mongoose Bicycles. Bodell was in the class of potential financiers and the letter was given to Bodell for the very purpose of inducing it to lend $4,000,000.00 to Jenson to be immediately paid by Jenson to Robbins to fund the repurchase of Cherokee & Walker's interest. Lightner knew full well that Jenson and Robbins were working together to raise funding, as the letter itself plainly demonstrates. Indeed, Lightner states in his August 22 letter "MadTrax . . . and its individual members Mark Robbins and Marc Jenson . . . will be depositing $165,000,000 . . . ."

Section 531 of the Restatement (Second) of Torts provides:

> One who makes a fraudulent misrepresentation is subject to liability to the persons ***or class of persons whom he intends or has reason to expect to act or to refrain from action in reliance upon the misrepresentation***, for pecuniary loss suffered by

---

[6] Neither Lightner nor Chase offered any testimony concerning Lightner's intent when drafting the letter requested by Robbins. Rather, Chase relies exclusively on the testimony of co-defendant Robbins on this point.

> them through their justifiable reliance in the type of transaction in which he intends or has reason to expect their conduct to be influenced. [Emphasis added]

The case of *Soderberg v. McKinney*, 44 Cal. App.4th 1760 (1996), is analogous to the instant case. There, investors in a brokered loan sued the real estate appraiser who had been retained by the mortgage broker to determine the value of real estate, asserting claims including negligent misrepresentation and fraud. As here, the defendant claimed that he was not liable to the investors as a matter of law because he did not know their names or identities at the time he made his misrepresentations. The court of appeals rejected this argument and reversed summary judgment in favor of the appraiser, observing:

> McKinney contends that under *Christiansen* he owed no duty to plaintiffs as a matter of law since he did not know their names or specific identities until after they had relied on his report and invested in the loan . . . .
>
> . . .
>
> Further, we do not believe that a real estate appraiser hired by a mortgage broker must know the potential investors by name or specific identity . . . . It is enough that the maker of the representation intends it to reach and influence either a particular person or persons, known to him, or a group or class of persons, distinct from the much larger class who might reasonably be expected sooner or later to have access to the information and forseeably to take some action in reliance upon it. It is enough, likewise, that the maker of the representation knows that his recipient intends to transmit the information to a similar person, persons or group. It is sufficient, in other words, insofar as the plaintiff's identity is concerned, that the maker supplies the information for repetition to a certain group or class of persons and that plaintiff proves to be one of them, even though the maker never had heard of him by name when the information was given. 44 Cal. App.4th at 640-641.

Accord, Reisman v. KPMG Peat Marwick L.L.P., 787 N.E.2d 1060, 1067-1068 (Mass. App. 2003) (accounting firm liable for false statements in the audit because plaintiffs were among those whom the accounting firm had reason to expect would rely on the statements because they were potential investors.)*; Texas Capital Securities, Inc. v. Sandefer*, 58 S.W.3d 760, 772-773 (Tex. App. 2001);

Woodward v. Dietrich, 548 A.2d 301, 309-310 (Pa. Supp. 1988); and *Citizens State Bank Moundridge v. Gilmore*, 603 P.2d 605, 610-611 (Kan. 1979).

The rule enunciated by the *Soderberg* court is consistent with the sound policy expressed in the language of the Restatement. This naturally raises the question to what class of persons Lightner's August 22, 2000 Letter was intended? That is a question of fact the jury will have to decide after hearing and weighing all the evidence at trial. The evidence shows that potential financiers for Jenson and Robbins was the class and that Bodell was a member of that class.

In the case at bar, Lightner had substantial knowledge concerning Robbins' and Jenson's business and was significantly involved in their financing efforts–Robbins himself testified he kept Lightner fully informed of "everything that was going on" with respect to the financing for the deal, and that he was "in constant contact" with Lightner about these transactions. [Robbins Depo. at 326, 330-31] Lightner knew that Cherokee & Walker owned part of at least one of Robbins' companies and that Robbins was going to buy out Cherokee & Walkers' interest. [Lightner Depo. at 41-42; 107-08] Lightner believes it likely that Bank One had conversations with Cherokee & Walker and Robbins about their business. [*Id.* at 203-04] As evidenced by Bank One's refusal to make additional funding available to him, Lightner knew Robbins did not have the money needed to buy out Cherokee & Walker's interest. Accordingly, Lightner knew Robbins would need to raise the funds. In fact, Lightner knew that Robbins was seeking funding for his transaction. [*Id.* at 157-58]

Lightner knew that Robbins and Jenson were partners. [Lightner Depo. at 39; 199-200] Lightner knew Robbins and Jenson were close enough that they did deals on the strength of merely a handshake. [*Id.* at 199-200] Lightner knew that Jenson and Robbins were "always lending money to

August 22, 2000 Letter, however, was nowhere to be found. Confirming that Lincoln Partners never received the August 22, 2000 Letter, David Houser and Robert Brown, both employed with Lincoln Partners at the time, and working as Brunswick's agents on Robbins' transaction, testified they had no recollection of ever having seen the letter. [Houser Depo. at 51-52; Brown Depo. at 73] They did, however, have a clear recollection of other letters and documents sent by Lightner, and they remembered telephone calls with Lightner concerning those documents. [Houser Depo. at 16-18, 38-41; Brown Depo. at 55-61]

One of the documents that was in Lincoln Partners' files was a letter written by Lightner on Bank One letterhead dated October 19, 2000, addressed to Brown at Lincoln Partners. [*See* Exhibit C] That letter recites many of the same misrepresentations contained in the August 22, 2000 letter relied upon by Bodell. [*Compare* Exhibit C and Exhibit H] The October 19, 2000 letter makes no reference whatsoever to the August 22, 2000 letter. A reasonable jury could conclude that Robbins confused the two letters in his testimony, or simply disbelieve his testimony for any number of reasons including bias or his claimed poor recollection of many of the related events. Indeed, there would be no reason to send the October 19 letter to Lincoln Partners if the August 22 letter had already been sent.

The fact that the letter was addressed "To Whom It May Concern" is also persuasive evidence from which a jury could reject Robbins's biased testimony and find that Lightner intended and understood that the letter would be used to raise financing from any potential financier. The significance of the fact that the Letter was addressed "To Whom It May Concern" is underscored by the fact that the October 19, 2000 letter Lightner sent to Lincoln Partners making similar misrepresentations was addressed to "Rob Brown, Vice President, Lincoln Partners, LLC" and that on July 27, 2000, nearly a

each other." [*Id.* at 39] While denying having any specific memory of the reason, Lightner testified he took numerous checks to Cherokee & Walker at the direction of Robbins or Jenson, likely in the year 2000, as an employee of Bank One. [*Id.* at 40-41] Lightner knew that Robbins received money from Jenson in 2000, and though admittedly fuzzy on the details, Lightner even admits he believed Robbins used that money to re-acquire Cherokee & Walker's interest in Robbins's companies. [*Id.* at 259-60] A reasonable jury could easily conclude based on these facts that Lightner intended the letter to be shown to potential financiers or had reason to expect that would occur.

In this regard, the fact that Robbins testified in his deposition that he wanted the letter for the purpose of (falsely) demonstrating his financial strength to Lincoln Partners is not conclusive on that issue. It is obviously in Robbins's interest as a Defendant in this case named in a separate fraud count to attempt to establish that Bodell has no claims based on the letter because, as Robbins has already testified, he knew that the statements contained in the letter were false and he has potential liability based on those false statements. A jury may simply believe, especially in light of the contradictory evidence, that Robbins' claim is self-serving and not credible. Notably, when asked directly if he told Lightner he intended to show the August 22, 2000 Letter to potential investors, Robbins reply was "I don't recall." [Robbins Depo. at 325-326] Moreover, Lightner (for Chase) did ***not*** testify that he intended that the letter be given only to Lincoln Partners.

Chase can offer no explanation why the August 22, 2000 letter is not in Lincoln Partners' files if, as Chase contends, Lincoln Partners was the intended recipient. Chase subpoenaed Lincoln Partners' records in this case and received documents in response. Those responsive documents include numerous other letters and documents, including other letters from Lightner and Bank One. The

month prior to writing the August 22 Letter, Lightner signed a letter making similar misrepresentations addressed specifically to "James Schenk, Vice President, Brunswick Corporation." [*See* Exhibit G] A reasonable jury could certainly conclude that if Lightner only intended that his August 22 Letter be given to Lincoln Partners he would have specifically addressed the letter to Lincoln Partners as he specifically addressed the other two letters to the companies to which they were directed.

Finally, Chase acknowledges through its Rule 30(b)(6) designees that the problem with writing a letter addressed "To Whom It May Concern," and the reason standard banking practice dictates such letters not be written, is that any number of people may rely on such a letter. To this end Lightner himself testified:

> Q: Is there a reason that you wouldn't write such a letter as a private banker at Bank One in 2000?
>
> A: It would be stupid. Point blank, it would be stupid because you don't know who–you don't know who the letter is going to. You're writing to whom it may concern, that could be a person out here on the street, and it would have no purpose for writing it.

[Lightner Depo. at 248]

Susan Mayo, Chase's other Rule 30(b)(6) designee agreed:

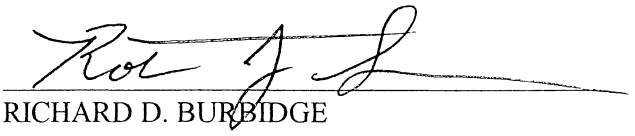
> Q: I think the reason–I'm just trying to establish the reason that the bank does not publish a letter "To Whom It May Concern." What's the reason for that?
>
> A: Just what you said, the risk. There's risk when you have something in print, in circulation and you don't know enough about it. We agree.
>
> Q: And the risk is that any person could claim, "I am to whom it may concern?"
>
> A: Depending on their education level, I guess you could. You could.....

[Mayo Depo. at 100]

Lightner obviously intended some person or class of persons receive and rely on the misrepresentations he made in the August 22, 2000 Letter. Clearly, whether Lightner intended his August 22 Letter to be given only to Lincoln Partners or to anyone in the class of potential financiers and/or whether he had reason to expect that it would be given to a member of the class of potential financiers are questions of fact for the jury to decide based on all the evidence at trial, and particularly after the jury has an opportunity to assess for themselves the credibility of Robbins' testimony in light of all the contradictory evidence.

DATED this 8th day of January, 2007.

BURBIDGE MITCHELL & GROSS



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CERTIFICATE OF SERVICE

On the date below written, the undersigned hereby certifies that a true and correct copy of the foregoing **PLAINTIFF BODELL CONSTRUCTION COMPANY'S MEMORANDUM IN OPPOSITION TO MOTION OF JPMORGAN CHASE BANK, N.A. FOR PARTIAL SUMMARY JUDGMENT ON FRAUD CLAIM** was sent in the manner shown below:

VIA HAND DELIVERY TO:

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DATED this 8th day of January, 2007.

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Tab 4

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IN THE THIRD JUDICIAL DISTRICT COURT IN AND FOR

SALT LAKE COUNTY, STATE OF UTAH

BODELL CONSTRUCTION COMPANY, a Utah corporation, Plaintiff, vs. MARK H. ROBBINS; CHEROKEE & WALKER INVESTMENT COMPANY, L.L.C., a Utah limited liability company; CHEROKEE & WALKER, L.L.C., a Utah limited liability company; BANK ONE, UTAH, NATIONAL ASSOCIATION, a national banking association, and DOES 1 through 50, Defendants.	**REPLY MEMORANDUM IN SUPPORT OF MOTION OF JPMORGAN CHASE BANK, N.A. FOR PARTIAL SUMMARY JUDGMENT ON FRAUD CLAIM** Case No. 030917018 Honorable John Paul Kennedy

Summary of Reply

Bank One's Motion for Partial Summary Judgment on Fraud Claim centers upon a letter dated August 22, 2000 purportedly sent by Ben Lightner of Bank One (the "8-22-00 Letter"). To

establish a claim for fraud, Bodell must prove, by clear and convincing evidence, that, among other things, Bank One intended or had reason to expect that Bodell, or a class of persons which includes Bodell, would rely on the 8-22-00 Letter This expectation element requires that Bank One must have had information that would lead a reasonable person to conclude that there is an "especial likelihood" that the letter would reach Bodell and influence its conduct This is the sole issue presented in Bank One's Motion

Bodell's response to the Motion is to attempt to introduce additional evidence to create a genuine issue of fact as to whether Bank One had such intent or expectation, thereby precluding summary judgment Much of the evidence that Bodell attempts to introduce is not material – it does not go to the issue of Bank One's intent or expectation or it goes to events that occurred after the date of the 8-22-00 Letter and after the Bodell loan had been made - and Bodell's characterization of the testimony frequently overstates what the testimony actually was Nonetheless, even viewing all of the material evidence in the light most favorable to Bodell, reasonable persons could not conclude, by clear and convincing evidence, that Bank One had information demonstrating it was especially likely that the 8-22-00 Letter would influence Bodell Therefore summary judgment is proper

Statement of Undisputed Facts

Bodell's opposition does not dispute any of the facts set forth in Bank One's Statement of Undisputed Facts Bodell's only response is to assert that additional facts Bodell claims need to be considered [1]

Bank One does not dispute the documents or deposition excerpts attached to Bodell's opposition Bank One does, however, object to many of the characterizations of that evidence by Bodell as overstatement or inaccurate and as assuming as facts matters that are clearly disputed

[1] Bodell disputes Paragraph 13 of Bank One's Statement of Undisputed Facts, which states, 'There is no other evidence in the record concerning the intent or expectation of Bank One concerning the August 22, 2000 letter (assuming the letter is authentic),' by simply stating that there is other evidence, without any specific citation

Bank One asks that the Court consider only the actual testimony and documents, not Bodell's characterizations.[2] The Paragraphs in Bodell's Opposition to which this applies are 23, 26, 27, 28, 30, 37, 38, 39, 40, 46, and 48.

Furthermore, the points asserted in the following Paragraphs of the Opposition are not material because they occurred after the date of the 8-22-00 Letter and after the Bodell loan was made or do not go to the fraud issues: 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, and 49.

Most importantly, there are no genuine issues as to the facts upon which the Motion is based and upon which Bodell relies. This matter is therefore ripe for summary judgment.

For purposes of this Motion only, Bank One assumes that Bodell can prove all elements of its case except the intent to cause reliance and expectation of reliance requirement. Therefore, the Court does not need to decide the numerous factual issues injected by Bodell – whether Lightner wrote the 8-22-00 Letter or the other letters, whether the letters are false, whether the letters should have been sent, etc.

Construing the facts in the light most favorable to Bodell (and avoiding characterizations and conclusions – sticking to the facts), the Statements of Facts submitted by both parties show that there is no genuine issue as to the following:

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[2] For example, Paragraph 13 of the Opposition states, 'Bank One did not do any due diligence, with respect to the 'To Whom It May Concern Letter' or any of the other letters authored by Lightner" The first problem is that, as cited in Bank One's Memorandum, Lightner does not admit to authoring the letters and challenges their validity Second, Bodell cites to the Lightner Deposition at 250 18-23 to support its statement but this passage does not support Bodell's characterization This passage states

> Q Is it true that because you deny having written the letters that we just looked at, you're not aware of any due diligence performed by Bank One concerning any statements in those letters?
>
> A Well, if – because I didn't – I didn't write the letters, then it would be true

In other words, Mr Lightner merely agreed with this convoluted question that if he did not send the letters, then obviously he would not have done any due diligence before not sending the letters This is very different than how Bodell characterizes this exchange

1. Mark Robbins testified that the 8-22-00 Letter was intended solely for Lincoln Partners to be used in connection with the potential acquisition of the Mongoose Bicycle Division and was never intended to be shown to anyone else. Mr. Shelby's cross-examination repeatedly tried to shake this testimony but Mr. Robbins never wavered.

2. The testimony of Mr. Robbins is the only direct evidence on the issue of the intent for which the 8-22-00 Letter was written. There is no other direct evidence of this intent.

3. Since Mr. Lightner does not acknowledge authoring the 8-22-00 letter, he obviously does not have any knowledge of the intent in preparing the letter.

4. Marc Jenson testified he was not involved in requesting the 8-22-00 Letter; he received a copy of the 8-22-00 Letter from Robbins; he had no discussions with Robbins regarding what Jenson intended to do with the letter, and Jenson had no discussions with Lightner or anyone else at Bank One concerning the letter.

5. Bank One has no relationship whatsoever with Bodell. Bodell was not a customer of Bank One and had no accounts with Bank One. Michael Bodell and Ben Lightner have never met or spoken (except in this litigation). Lightner did not even know that Bodell existed.

6. Bank One had no knowledge whatsoever that Bodell was considering a loan to Jenson or his company.

7. Lightner testified that he had no idea where Robbins was going to get the money to buy out Cherokee & Walker.

8. Additional facts added in Bodell's Opposition:

a. The 8-22-00 Letter was addressed "To Whom It May Concern".

b. When Lightner allegedly wrote a second letter for Lincoln Partners dated October 19, 2000, the letter was addressed to Rob Brown at Lincoln Partners.

c. Lightner knew that Robbins and Jenson were friends and did business together, often on a handshake.

d. Lightner knew Robbins received money from Jenson in 2000 but did not know what was done with the money.

e. When Lightner later moved to another bank, Robbins and Jenson moved their business with him to the new bank.

f. Bank One made loans to Robbins and his companies during 2000. Bank One received financial statements and tax returns for Robbins and his companies. Bank One conducted due diligence on their credit worthiness.

g. Lightner knew Robbins was buying Cherokee & Walker's interest in his companies.

h. Lightner knew Robbins would need to borrow money to buy out the interest of Cherokee & Walker.

i. Lightner knew Robbins was attempting to acquire the Mongoose Bicycle Division from Brunswick Corporation. Robbins kept Lightner advised of developments in this transaction.

j. Lightner attended a meeting with Robbins and Arimex International concerning funding for Robbins to purchase the Mongoose Division.

k. Lightner allegedly authored a letter to Brunswick Corporation dated July 27, 2000 which falsely characterized the relationship between Bank One and MadTrax Group and falsely stated that MadTrax had the financial resources to acquire the Mongoose Division.

l. After the 8-22-00 Letter and after the Bodell loan was made, Lightner allegedly authored three other documents that falsely portrayed Robbins' financial condition. Those letters were addressed to Lincoln Partners or Union Bank of Switzerland.

m. The files of Lincoln Partners do not contain the 8-22-00 Letter.

Argument

I. Legal Standards for Summary Judgment on a Fraud Claim

In its Memorandum in support of the Motion, Bank One cited authority establishing that a fraud claim must be proved by clear and convincing evidence and this standard of proof must be applied in ruling on a summary judgment motion. In *Anderson v. Liberty Lobby, Inc.*, 477 U.S.242, 106 S.Ct. 2505 (1986), the U.S. Supreme Court explained that summary judgment should be granted when the evidence opposing the motion is merely colorable or is not significantly probative and is not sufficient for a jury to return a verdict for the party opposing the motion. 477 U.S. at 249. The Court also ruled, "[W]e are convinced that the inquiry involved in ruling on a motion for summary judgment . . . necessarily implicates the substantive evidentiary standard of proof that would apply at the trial on the merits." *Id.* at 252. When a clear and convincing standard is required at trial, in ruling on a motion for summary judgment the trial court must consider whether a reasonable fact finder could conclude that the element of the case had been shown by a clear and convincing standard. *Id.* at 252. *See*, also, *Applied Genetics International Inc. v. First Affiliated Securities, Inc.*, 912 F.2d 1288 (10th Cir. 1990) ("[T]o succeed on it fraud claim at trial, [Plaintiff] would have had to prove each element of fraud by clear and convincing evidence. Similarly, the clear and convincing standard must be considered in determining whether defendant's motion for summary judgment should have been granted on the fraud claim." 912 F.2d at 1243.)

II. Intent to Cause Reliance and Expectation of Reliance

There is no genuine dispute as to the legal standard applicable in this case. It has been stated in the Restatement (Second) of Torts § 531 and accompanying comments and followed in a number of cases. Bank One has shown a prima facia case that the required evidence is not present. To defeat the Motion, Bodell must demonstrate the existence of admissible evidence from which a reasonable person could conclude, under a standard of clear and convincing

evidence, that Bank One intended or had reason to expect that Bodell, or a class of persons which includes Bodell, would rely on the 8-22-00 Letter. To establish this, the jury must be able to find, by clear and convincing evidence, that Bank One had information that would lead a reasonable man to conclude that there is an "especial likelihood" that the letter would reach Bodell and influence its conduct.

The sole issue this Court needs to decide is whether Bodell has marshaled sufficient evidence to convince this Court that a reasonable person, acting under a clear and convincing standard, could find a special likelihood that the 8-22-00 Letter would be expected to reach Bodell.

Other cases that have addressed this issue are instructive. In *Ernst & Young LLP v. Pacific Mutual Life Insurance Company*, 51 S.W.3d 573 (Tex. 2001) (cited in Bank One's Memorandum), the Plaintiff claimed to have relied on financial statements issued by Ernst & Young in purchasing $8.5 million of notes. The Plaintiff put on evidence from financial experts showing that international accounting firms like Ernst & Young knew and expected that people would rely on their audit reports to make investment decisions. Nonetheless, the Texas Supreme Court granted summary judgment for Ernst & Young finding that the intent or expectation requirement had not been met.

In *Strong v. Retail Credit Company*, 552 P.2d 1025 (Colo. App. 1976), Fidelity Mutual Life Insurance Company hired Retail Credit Company to prepare a background report on Angel Canino to determine Canino's fitness for employment as an insurance agent. Retail Credit gave a favorable report and failed to disclose criminal convictions of Canino. Based on the favorable report, Fidelity then hired Canino as an insurance agent. Subsequently, Strong entrusted money to Canino in his capacity as an insurance agent for Fidelity which Canino stole. Strong then sued Retail Credit for fraud for providing the inaccurate report. The Court upheld the trial court's

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granting of summary judgment in favor of Retail Credit, finding that Strong was not within the class of persons that Retail Credit would expect to be influenced by the report.

In *The Colonial Bank of Alabama v. Ridley & Schweigert, et. al*, 551 So. 2d 390 (Ala. 1989), the Defendants were auditors who provided annual financial statements. The auditors provided multiple copies of the financial statements, suggesting knowledge that the audit would be provided to others. In the course of performing the audit, the auditors sent a standard bank confirmation to Colonial Bank of Alabama, showing the auditors knew of the relationship with the bank. The bank made loans to the plaintiff in reliance on the financial statements. The bank sued the auditors for fraud based on inaccurate information in the financial statements. The trial court granted summary judgment for the auditors. The Alabama Supreme Court upheld the summary judgment, finding there was insufficient evidence to show that the auditors were aware that the bank would rely on the audited financial statements.

Tara Capital Partners I, L.P. v. Deloitte & Touche, L.L.P., 2004 WL 1119947 (Tex. App. 2004) also sustained summary judgment in favor of the defendant auditors. Evidence that the auditors were generally aware of the investor's reliance on financial statements and that corporate management held conference calls with those investors to discuss financial information was not sufficient to raise a fact issue on intent to induce reliance.

The evidence cited by Bodell is less compelling than the evidence in the above cases. Bodell has not shown sufficient evidence that a reasonable person could conclude, by clear and convincing evidence, that there was a special likelihood that the 8-22-00 Letter would reach Bodell and influence its conduct.

The only evidence on the purpose of the 8-22-00 Letter is the testimony of Mark Robbins that the letter was intended solely for Lincoln Partners, not Bodell. Robbins' testimony did not change under repeated cross-examination. The subject matter of the 8-22-00 Letter is a loan to Robbins and associates from Arimex International, which was to be used for the Mongoose

acquisition. The content of the letter reinforces that the letter was intended only for Lincoln Partners. The only rebuttal Bodell can offer is that a jury might decide not to believe Robbins.

Bodell relies on evidence that Bank One knew Robbins and Jenson were involved in businesses together and Bank One knew that Robbins was buying out the interest of Cherokee & Walker in his businesses and would need to borrow money to do this. But Bank One knew nothing about how this buy-out would be financed. Bank One did not know that Jenson would loan the funds to Robbins. Bank One had no information that Jenson would borrow the money from Bodell. Bank One had never heard of Bodell and didn't even know Bodell existed. There was no relationship whatsoever between Bank One and Bodell. There is no evidence that Bank One expected the 8-22-00 Letter would be used for any purpose other than the Mongoose acquisition.

The fact that the 8-22-00 Letter is addressed "To Whom It May Concern" does not change this analysis. The undisputed testimony of Mark Robbins is that the letter was intended solely for Lincoln Partners. Even without that testimony, this form of address does not demonstrate by clear and convincing evidence that a letter discussing the financing from Arimex International, which was to be used to finance the Mongoose acquisition, was expected to be used to solicit investors for totally unrelated projects.

Other documents allegedly authored by Bank One subsequent to when the Bodell loan was made are not relevant or material to the intent to induce or expectation requirement concerning the 8-22-00 Letter. Bodell cites deposition testimony from Bank One representatives that the 8-22-00 Letter should not have been sent and did not meet banking standards of practice, apparently in an attempt to show breach of a duty. Breach of duty is an element of a negligence claim, not a fraud claim. The elements of intent to induce and expectation of reliance are legal doctrines, determined by the law and not by testimony of witnesses as to whether a letter was appropriate.

Bank One's situation is identical to the illustration given in the official commentary to Restatement § 531 (cited in Bank One's Memorandum at p. 17):

> A [Bank One] [allegedly] makes fraudulent statements concerning the financial standing of B [MadTrax Group LLC, Robbins, and Jenson] to C [Robbins] and asks him to repeat them to D [Lincoln Partners] for the purpose of inducing D [Lincoln Partners] to [sell the Mongoose Bike Division] to B [MadTrax Group LLC, Robbins, and Jenson]. A [Bank One] does not intend and has no reason to expect that C [Robbins] will repeat the statements to anyone other than D [Lincoln Partners]. C [Robbins] repeats them to [Jenson, who in turn,] repeats them to E [Bodell], who relies upon the statements and extends credit to B [Jenson]. A [Bank One] is not liable to E [Bodell] under the rule stated in [Restatement (Second) of Torts § 531].

Restatement (Second) of Torts § 531 illus 2. (modified).

The only direct evidence of Bank One's intent is the testimony of Mark Robbins that unequivocally maintains that the 8-22-00 Letter was intended only for Lincoln Partners. Bank One did not know that Bodell even existed and did not know that Robbins would give the 8-22-00 Letter to Jenson, who would in turn give it to Bodell to induce a loan. There is no evidence, particularly under a clear and convincing standard of proof, that Bank One had any expectation of a special likelihood that the 8-22-00 Letter would be used for any other purpose. Just as in the illustration to the Restatement, Bank One is not liable to Bodell.

Conclusion

There is no genuine issue as to the facts pertinent to Bank One's Motion, only disputes as to the characterizations of those facts by Bodell. There is no genuine dispute as to the legal requirements for Bank One to be liable to Bodell based on the 8-22-00 Letter. The motion to dismiss the fraud claim is ripe for summary judgment. The only issue is whether a reasonable person could find, by clear and convincing evidence, that Bank One intended or had reason to expect that Bodell, or a class of persons which includes Bodell, would rely on the 8-22-00 Letter. To meet this test, the reasonable person must conclude that there was an "especial likelihood"

that the letter would reach Bodell and influence its conduct Bodell has failed to demonstrate the existence of such evidence and therefore the Motion should be granted [3]

Dated January 29, 2007

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[3] Bodell s Opposition asserts that Bank One is only entitled to file one summary judgment in this action and having filed its Motion for Partial Summary Judgment on Fraud Claim, is now precluded from filing any other summary judgment motion Opposition Memo , pp 3 4 Since Bank One has only filed one motion, it is peculiar that Bodell has raised this argument However, Bank One will respond to this point lest its silence be construed as a concession As cited by Bodell, at the hearing more than a year ago on January 6, 2006, the Court expressed its preference for the handling of summary judgment motions Counsel for Bank One and Robbins have discussed how to approach the complex issues in this case in a way that will be responsive to the Court's direction, including filing a joint statement of material facts At the hearing on Bodell's Motion to Amend on September 18, 2006, after granting the Motion to Amend, the Court expressly directed the parties to file any summary judgment motions on the new fraud claim by November 30, 2006, which Bank One did In drafting the Order for that hearing, Mr Tufts did not include this direction in the Order Bank One is not clear what the Court intended by its statements on January 6 but the Court was clear in its direction on November 30, which Bank One interpreted as superseding any limitations imposed on January 6 At the appropriate time, the parties need to discuss with the Court the possible summary judgment motions in this case and how the Court wants the parties to proceed But that is a matter for another day

CERTIFICATE OF SERVICE

I hereby certify that on the 29th day of January, 2007, a true and correct copy of the foregoing was mailed via first class United States mail, postage pre-paid, to the following:

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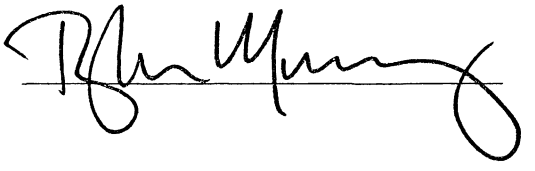

Tab 5

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IN THE THIRD JUDICIAL DISTRICT COURT IN AND FOR

SALT LAKE COUNTY, STATE OF UTAH

BODELL CONSTRUCTION COMPANY, a Utah corporation, Plaintiff, vs. MARK H. ROBBINS; CHEROKEE & WALKER INVESTMENT COMPANY, L.L.C., a Utah limited liability company; CHEROKEE & WALKER, L.L.C., a Utah limited liability company; BANK ONE, UTAH, NATIONAL ASSOCIATION, a national banking association, and DOES 1 through 50, Defendants.	**BANK ONE'S MOTION FOR SUMMARY JUDGMENT ON PLAINTIFF'S FRAUD AND NEGLIGENT MISREPRESENTATION CLAIMS** Case No. 030917018 Honorable John Paul Kennedy

Pursuant to Rule 56 of the Utah Rules of Civil Procedure, Defendant JPMorgan Chase Bank, N.A., as successor by merger to Bank One, N.A. ("Bank One"), moves this Court for

summary judgment on the fraud and negligent misrepresentation claims of Plaintiff Bodell Construction Company on the following grounds:

1. There was no representation of a past or presently existing fact.

2. The representations were not false.

3. Any reliance was unreasonable.

4. All claims have been previously satisfied by an accord and satisfaction.

5. Bank One did not have the required pecuniary interest in the loan made by Plaintiff (negligent misrepresentation claim only).

6. Bank One was not in a superior position to ascertain the facts (negligent misrepresentation claim only).

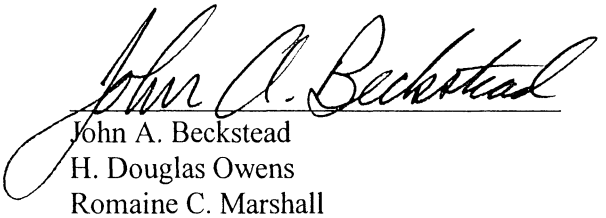
7. Plaintiff was not a foreseeable recipient of the letter from Bank One (negligent misrepresentation claim only).[1]

This Motion is supported by a Memorandum in Support of Bank One's Motion for Summary Judgment on Plaintiff's Fraud and Negligent Misrepresentation Claims filed herewith and the Exhibits thereto.

Bank One requests that summary judgment be entered in its favor on all claims and causes of action, the Complaint be dismissed upon the merits, and Bank One be awarded its costs.

[1] Bank One previously filed a Motion for Partial Summary Judgment on Fraud Claim dated November 29, 2006 seeking summary judgment on Plaintiff's fraud claim, also on the theory that Plaintiff was not a foreseeable recipient of the letter. This Motion has been fully briefed, argued and is under advisement.

Dated: July 2, 2007.



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I hereby certify that on the 2nd day of July, 2007, a true and correct copy of the foregoing was mailed via email and first class United States mail, postage pre-paid, to the following:

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IN THE THIRD JUDICIAL DISTRICT COURT
IN AND FOR SALT LAKE COUNTY, STATE OF UTAH

BODELL CONSTRUCTION COMPANY, a Utah corporation, Plaintiff, v. MARK H. ROBBINS; CHEROKEE & WALKER INVESTMENT COMPANY, L.L.C., a Utah limited liability company; CHEROKEE & WALKER, L.L.C., a Utah limited liability company; BANK ONE, UTAH, NATIONAL ASSOCIATION, a national banking association, and DOES 1 through 50, Defendant.	**MEMORANDUM IN SUPPORT OF BANK ONE'S MOTION FOR SUMMARY JUDGMENT ON PLAINTIFF'S FRAUD AND NEGLIGENT MISREPRESENTATION CLAIMS** Civil No. 030917018 Judge John P. Kennedy

Pursuant to Rule 56 of the Utah Rules of Civil Procedure, Defendant JPMorgan Chase Bank, N.A., as successor by merger to Bank One, N.A. ("Bank One"), respectfully submits this Memorandum in Support of its Motion for Summary Judgment on Plaintiff's Fraud and Negligent Misrepresentation Claims.

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PROCEDURAL BACKGROUND

As the Court knows from past hearings, this case is factually and legally complex. After some four years of discovery, depositions, motions and rulings, the case is now set for a jury trial commencing October 22, 2007. The Court has also set a deadline of July 1, 2007 for the filing of dispositive motions. The summary judgment theories in this Motion are also complex. Notwithstanding this complexity, the facts and issues can be distilled into clear points as to which there is no genuine issue of material fact. This case is ripe for summary judgment on numerous alternative theories. The parties should not be subjected to the very substantial expense and time of a lengthy trial when the case can and should be resolved by summary judgment.[1]

Early in this case, just six weeks after filing its Answer to the Complaint, Bank One filed its Motion for Summary Judgment dated October 29, 2003, based on the argument that the settlement agreement between Bodell Construction Company and MSF Properties/Marc Jenson was an accord and satisfaction which satisfied and extinguished the debt upon which Bodell now attempts to sue Bank One. The Motion was denied by the Hon. William H. Bohling. Bank One reasserts this argument as part of this Motion.[2]

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[1] In the Scheduling Order and Order on Motions filed May 29, 2007, the Court ordered: "Motions for summary judgment based on multiple theories may be filed as separate motions or as consolidated motions. If consolidated motions are filed, the memorandum in support of the consolidated motion and the memorandum opposing consolidated motions may be overlength, not to exceed 10 pages of argument for each theory advanced, and the reply memorandum may be over-length, not to exceed 5 pages of argument for each theory." Bank One has elected to file this consolidated motion, the length of which is well below the limits ordered by the Court.

[2] This argument is still ripe and Bank One again asserts this argument. A trial judge has discretion to reconsider a summary judgment argument. *Timm v. Dewsnup*, 921 P.2d 1381, 1386 (Utah 1996).

Bank One also filed a Motion for Partial Summary Judgment on Fraud Claim dated November 29, 2006, based on the theory that Plaintiff was not a foreseeable recipient of the letter upon which Plaintiff claims to have relied. Hearing on that Motion was held April 6, 2007 and the Motion was taken under advisement and no ruling has been issued. This Motion presents a parallel argument on the negligent misrepresentation claim.

Oral argument on all dispositive motions is set for September 10, 2007, at 9:00 a.m.

INTRODUCTION

In the summer of 2000, Plaintiff Bodell Construction Company ("Bodell") made a loan in the amount of $4 million (the "Bodell Loan") to MSF Properties, L.C. ("MSF"), a company owned and managed by Marc Jenson ("Jenson"), a long-time acquaintance of Bodell's president, Michael Bodell. This loan promised an incredible return of 1% per week – 52% per annum – plus an $80,000 loan origination fee to Bodell. This wildly profitable loan was evidenced only by a promissory note and personal guarantee from Jenson. Bodell neither requested nor received any security for repayment of the loan. Thus, when MSF and Jenson defaulted on the Bodell Loan, Bodell's remedy was limited to seeking repayment under the note and guaranty. Three years later, Bodell settled its claims with MSF and Jenson for $3 million.

During that three year period, Bodell never made a claim against Bank One. In fact, Bodell never even advised Bank One of the situation. Bank One did not even know the Bodell Loan existed. Finally, just before expiration of the statute of limitations, without a prior demand letter or any other communication, Bodell filed this lawsuit against Bank One and other third

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"Moreover, a judge is free to change a ruling until a final decision is formally rendered." *Tremblay v. Mrs. Fields Cookies*, 884 P.2d 1306, 1311 (Utah Ct. App. 1994).

parties unrelated to the Bodell Loan, seeking to recoup money in addition to what had already been accepted from Jenson. Bodell's claims against Bank One are for fraud and negligent misrepresentation. Bodell's sole allegation in support of its claims is that Bodell relied on statements about a future event made in a letter on Bank One letterhead that was not addressed to Bodell and which Bodell never verified or investigated.

Bank One now seeks summary judgment on the following theories and grounds (in addition to the pending summary judgment motion on the fraud claim which is under advisement):

1. There was no representation of a past or presently existing fact.

2. The representations were not false.

3. Any reliance was unreasonable.

4. All claims have been previously satisfied by an accord and satisfaction.

5. Bank One did not have the required pecuniary interest in the Bodell Loan (negligent misrepresentation claim only).

6. Bank One was not in a superior position to ascertain the facts (negligent misrepresentation claim only).

7. Bodell was not a foreseeable recipient of the Lightner Letter (negligent misrepresentation claim only).

Bodell's tale of loss is a pointed reminder that if a deal appears too good to be true, it probably is. But Bodell's desire to recoup losses in addition to those already recovered from Jenson do not justify its unsubstantiated claim against Bank One. As set forth below, Bodell has

RNR

not offered any evidence to satisfy the essential elements of its fraud or negligent misrepresentation claims. Bank One is therefore entitled to summary judgment.

STATEMENT OF UNDISPUTED MATERIAL FACTS

A. Mark Robbins and His Bicycle Businesses

1. Defendant Mark Robbins was involved in the bicycle business. In 1998, Mark Robbins and others formed Wasatch Cycle, Inc. ("Wasatch Cycle"), which designed, sold and distributed bicycles to LDS missionaries. Ex. 1, Robbins Dep. at 40-45, 49. In 2000, Robbins started a company known as Vtrax Sports LLC ("Vtrax Sports"). Vtrax's plan was to sell and distribute high-end bicycles through various channels, including large mass-merchandisers like Sears and Wal-Mart. Ex. 2, Robbins Dep. at 59-60; 67-70. Also in 2000, Robbins founded a company called madwagon.com LLC (sometimes referred to in the Robbins deposition as Madwagon, LLC) which attempted to sell bicycles on college campuses and via the Internet. Ex. 3, Robbins Dep. at 76.

B. Mark Robbins' Attempt to Acquire Mongoose, the August 22, 2000 Letter, and Its Intended Use in Connection With the Planned Mongoose Transaction

2. In the summer of 2000, Robbins also began pursuing an opportunity to buy the Mongoose Bicycle Division from Brunswick Corporation. Robbins formed a company called MadTrax Group LLC ("MadTrax") to pursue this acquisition. He sent letters on behalf of MadTrax confirming its interest in the acquisition. Ex. 4, Robbins Dep. at 81; 194-95; Ex. 5, July 11, 2000 Letter from MadTrax to Brunswick;[3] Ex. 7, July 13, 2000 Letter from MadTrax to

[3] For an evidentiary foundation for this document, *see* Ex. 6, Robbins Dep. at 486-487.

Brunswick.[4]

3. In response, Brunswick required MadTrax to agree to maintain the confidentiality of the materials Brunswick provided to enable MadTrax to evaluate the Mongoose Bicycle Division. Ex. 8, July 13, 2000 Confidentiality Letter Agreement.[5]

4. In addition, on August 9, 2000, Lincoln Partners, the investment banking firm representing Brunswick in the sale of the Mongoose Division, sent a letter to Trevor Larson, MadTrax CFO, asking for, among other things, "a description of your sources and level of financing for the proposed transaction." Ex. 9, August 9, 2000 Letter from Lincoln Partners to Trevor Larson.[6]

5. Robbins was a client of Bank One's private banking services at this time. Bank One employee Benjamin Lightner was Mr. Robbins' private banker. Robbins testified that in August 2000, he had conversations with Lightner about the fact that "Lincoln Partners and all of the investment bankers were, you know, looking for verification of funding and stuff like that." Robbins testified that he asked Lightner to draft a letter for Lincoln Partners regarding potential funding sources for MadTrax. Ex. 11, Robbins Dep. at 308-310, 316-17, 324-25.

6. One of Robbins' potential funding sources for the Mongoose acquisition was a loan from Arimex Investments, Ltd. ("Arimex"). Robbins (with Lightner in attendance on at least one occasion) had discussions with Arimex about a potential loan. Ex. 12, Robbins Dep. at 255-257; Ex. 13, Lightner Dep. at 156-57.

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[4] For an evidentiary foundation for this document, *see id.*
[5] For an evidentiary foundation for this document, *see* Ex. 6.
[6] For an evidentiary foundation for this document, *see* Ex. 10, Robbins Dep. at 488.

7. Robbins claims that Lightner produced a letter dated August 22, 2000 in response to the request regarding funding sources. The letter reads:

> To: Whom it May Concern
>
> Re: Mad Trax Group, LLC
>
> MadTrax Group, LLC (the "Company") and its individual members Mark Robbins and Marc Jenson (the "Members") will be depositing $165,000,000 into Bank One, Utah NA. The funding is coming from a loan agreement between MadTrax Group, LLC, a Utah limited liability company and Arimex Investments, LTD., a Bahamian corporation. The sum of $165,000,000 will be deposited into an interest bearing account in the name of the Company and managed by its Members.
>
> Should you have any questions with respect to this matter, please contact the Undersigned.
>
> Ben Lightner
> Wealth Advisor
> Private Banking Group

Ex. 14, August 22, 2000 Letter (the "Lightner Letter").[7]

8. As of the date of the Lightner Letter, Robbins believed that Arimex was willing and able to make the Arimex Loan to MadTrax as described in the letter. Ex. 16, Robbins Dep. at 286, 447-448. Indeed, a loan agreement had been signed by Arimex. *Id.* at 448; Ex. 17, Arimex Loan Agreement.[8]

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[7] Lightner testified that he was "unable to say either way" whether he wrote the August 22 letter but noted that his signature looked strange. Ex. 15, Lightner Dep. at 239. No copies of the August 22 Letter or any other evidence of the letter, or any of the other letters allegedly authored by Lightner have been found in the files of Bank One. The authenticity and validity of the Lightner Letter is a major, disputed issue in this case. However, for purposes of this Motion, it can be assumed *arguendo* that the letter is authentic and was authored by Lightner.

[8] For an evidentiary foundation for this document, *see* Ex. 18, Robbins Dep. at 85.

9. At all times, Robbins believed that Arimex would fund the Arimex Loan if Robbins asked Arimex to do so. Ex. 16, Robbins Dep. at 286, 447- 448.

10. Bank One was not a party to the Arimex Loan Agreement. Ex. 17, Arimex Loan Agreement.

11. The Lightner Letter was intended for Lincoln Partners in connection with the proposed Mongoose acquisition, and was not intended for other potential investors or for use in any other transaction. Under examination, Robbins testified:

> Q: You told Mr. Lightner that you needed a letter like this to show potential investors as evidence of, you know, your financial backing.
>
> A: Potential investors—its Lincoln Partners.
>
> ***
>
> Q: And what do you remember discussing with Ben Lightner about what use you intended to make of this letter?
>
> A: That the letter was being used for Lincoln Partners and – I mean we were having to do verifications and all that kind of stuff through that period.
>
> ***
>
> Q: Was it your intention in obtaining a letter like this that you would show it to potential investors as needed?
>
> A: No. I mean, I don't recall that, but I mean, this letter was intended for Lincoln Partners.
>
> ***
>
> Q: When you asked for this letter, was it your intention that be shown to anyone other than Lincoln Partners?
>
> A: No.

Ex. 19, Robbins Dep. 324, 326-327, 446.

12. On September 27, 2000, Lincoln Partners informed Trevor Larson that Brunswick "would like to invite [MadTrax] to submit a proposal to acquire [Mongoose.]" Ex. 20, September 27, 2000 Letter from Lincoln Partners to V-Trax.[9]

13. MadTrax hired Duff & Phelps to assist in its efforts to bid for the Mongoose Division, but despite help from Duff & Phelps, and despite making several offers for Mongoose ranging from $63 million to $76.6 million, MadTrax was not the winning bidder and was therefore unable to make the purchase. Ex. 22, Robbins Dep. at 200-03; Ex. 23, October 10, 2000 Letter from MadTrax to Lincoln Partners;[10] Ex. 25, November 3, 2000 Letter from MadTrax to Lincoln Partners;[11] Ex. 27, November 8, 2000 Letter from MadTrax to Lincoln Partners.[12]

14. There is no other evidence in the record concerning the intent or expectation of Bank One concerning the use to be made of the Lightner Letter.

C. Robbins Agrees to Purchase Cherokee & Walker LLC's Interest in Wasatch Cycle, Madwagon, and Vtrax

15. In 2000, around the same time he was working on the potential Mongoose transaction, Robbins was also working on a transaction through which he would purchase the 50% interest in Wasatch Cycle, Madwagon, and Vtrax owned by Cherokee & Walker LLC ("Cherokee & Walker"). Ex. 29, Robbins Dep. 145, 150-52.

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[9] For an evidentiary foundation for this document, *see* Ex. 21, Robbins Dep. at 226.
[10] For an evidentiary foundation for this document, *see* Ex. 24, Robbins Dep. at 228.
[11] For an evidentiary foundation for this document, *see* Ex. 26, Robbins Dep. at 243.
[12] For an evidentiary foundation for this document, *see* Ex. 28, Robbins Dep. at 503.

16. Cherokee & Walker had purchased its 50% interest in these companies on January 7, 2000. Ex. 30, January 7, 2000 Membership Interest Purchase Agreement.[13]

17. By June 10, 2000, Robbins and Cherokee & Walker had negotiated an agreement through which Robbins would repurchase Cherokee & Walker's 50% interest for approximately $8 million. Ex. 32, June 10, 2000 Purchase and Settlement Agreement;[14] Ex. 34, Robbins Dep. at 172-73.

18. Robbins needed to borrow or raise the $8 million to pay Cherokee & Walker, and ultimately identified an individual named Marc Jenson as a potential source of funds for the Cherokee & Walker buyout. Ex. 35, Robbins Dep. at 182-83.

D. Marc Jenson and the Bodell Loan

19. Jenson was in the business of borrowing funds and then loaning those funds to others. Jenson profits on the difference between the interest he pays to borrow the money and the interest he receives from lending the money. Ex. 36, Jenson Dep. at 305.

20. In mid-2000, Jenson met Robbins and learned that Robbins needed $8 million to buy out Cherokee & Walker's interest. After negotiations, Jenson agreed to loan Robbins the $8 million. Ex. 37, Jenson Dep. at 43-46; 48.

21. Jenson's plan was to fund the Robbins loan with $4 million of Jenson's own money and $4 million from someone else. Accordingly, Jenson approached Mike Bodell, president of Bodell Construction Company, about the possibility of borrowing $4 million that

[13] For an evidentiary foundation for this document, *see* Ex. 31 Robbins Dep. at 190-191.
[14] For an evidentiary foundation for this document, *see* Ex. 33, Robbins Dep. at 169-170.

Jenson would, in turn, loan to Robbins for the Cherokee & Walker buyout. Ex. 38, Jenson Dep. at 72-73; 102; Ex. 39, Bodell Dep. at 42-45.

22. Bodell had known Jenson for nearly twenty years, and had previously lent Jenson $1 million. Ex. 40, Bodell Dep. at 10, 18-20, 31.

23. Jenson testified that he received a copy of the Lightner Letter from Robbins. Jenson, however, had no discussions with Robbins regarding what Jenson intended to do with the letter. Ex. 41, Jenson Dep. at 215-16; Ex. 42, Robbins Dep. at 329.

24. Jenson likewise recalls no discussions with Lightner, or anyone else at Bank One, about the letter and was not involved in requesting that it be drafted. Nevertheless, as part of the discussion between Jenson and Bodell, Jenson provided a copy of the Lightner Letter to Bodell. Ex. 43, Jenson Dep. at 187, 215-16, 219, 227; Ex. 44, Bodell Dep. at 49-50.

25. Prior to making the Bodell Loan, no representation was made to Bodell that the $165 million deposit described in the Lightner Letter had been made. Ex. 45, Bodell Disc. Resp. at 6, Response to Req. for Adm. No. 5 (emphasis in original).

26. Bodell testified that he does not know whether the representations made in the Lightner Letter were false when made. Ex. 46, Bodell Dep. at 97.

27. Bodell Construction Company's Chief Financial Officer, Merrill Weight, testified that as far as he knows, the Lightner Letter is a "valid letter." Ex. 47, Weight Dep. at 94.

28. Bodell did not contact Bank One to verify the contents of the Lightner Letter. Ex. 48, Bodell Dep. at 56, 71, 73.

29. Similarly, Bodell did not conduct any due diligence relating to Arimex or its principals. Ex. 49, Bodell Dep. at 55-56.

30. On August 30, 2000, Bodell Construction Company loaned $4 million to MSF Properties, LC (a company owned by Marc Jenson) and obtained a personal guaranty from Jenson. Bank One was not a party to this loan. Ex. 50, August 30, 2000 Promissory Note;[15] Ex. 52, August 30, 2000 Guaranty[16] (collectively the "Bodell Loan").

31. The terms of the Bodell Loan required Jenson to pay a loan fee of $80,000 and to pay interest of 1% per week or 52% per year. The loan was due in 30 days. Ex. 40, Bodell Dep. at 19-20.

E. There Is No Relationship Whatsoever Between Bank One and Bodell

32. At the time of the Lightner Letter, Bodell had no relationship whatsoever with Bank One. Neither he nor his company was a customer and they had no accounts at Bank One. Bodell does not even know who Bank One employee Lightner is. Before making the loan to Jenson, Bodell never contacted Lightner or anyone else at Bank One. Ex. 54, Bodell Dep. at 11-12, 56; Ex. 55, Weight Dep. at 65; Ex. 56, Bodell Disc. Resp. at 5, Response to Req. for Adm. No. 2.

33. Similarly, while Lightner was aware that Robbins and Jenson had some sort of business relationship, Lightner recalls no discussions about Jenson loaning Robbins $8 million in connection with his bicycle business. Ex. 57, Lightner Dep. at 39.

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[15] For an evidentiary foundation for this document, *see* Ex. 51, Weight Dep. at 97-98.
[16] For an evidentiary foundation for this document, *see* Ex. 53, Weight Dep. at 31-32.

34. Bank One knew nothing about Bodell, or the loan that Bodell planned to make to Jenson, and had no discussions with Jenson about Bodell or Bodell Construction. Ex. 58, Lightner Dep. at 39, 205, 259.

35. Indeed, when asked directly about whether he knew where Jenson was getting money to loan to Robbins so that Robbins could buy out Cherokee & Walker, Lightner responded that he had "no idea." Lightner further testified that "I wouldn't know [Bodell] if he walked in here today." Ex. 59, Lightner Dep. at 259.

36. None of the funds from the Bodell Loan were paid to Bank One or were for Bank One's benefit. Ex. 60, Bodell Disc. Resp. at 18, Response to Int. No. 14; Ex. 61, Robbins Dep. at 449-450.

F. Jenson Settles with Bodell

37. Jenson failed to repay the Bodell Loan. First Amended Compl. ¶ 18.

38. For many months, Bodell sought repayment from Jenson—sometimes going so far as to make hourly calls to Jenson. Ex. 62, Jenson Dep. at 329-331. Jenson made several preliminary payments on the note. Ex. 63, Jenson Dep. 333-336.

39. Finally, on or about March 18, 2003, Bodell and Jenson entered into a Settlement Agreement (the "Settlement Agreement"). Ex. 64, Settlement Agreement.[17]

40. Pursuant to the Settlement Agreement, Jenson paid Bodell $3 million and Bodell accepted those funds as payment in full of the Bodell Loan. Ex. 64, Settlement Agreement, ¶¶ 1-2.

[17] For an evidentiary foundation for this document, *see* Ex. 65, Jenson Dep. at 246.

41. Paragraph 2 of the Settlement Agreement states:

> Each of Bodell and BCC [Bodell Construction Company], for himself, itself, their affiliates and for all persons or entities claiming by, through or under him, it or them, hereby **(a) releases, acquits, waives and forever discharges MSF**, its affiliates and their respective members, managers, officers, employees and agents (each, including without limitation Jenson, an "MSF Party") from any and all claims, allegations of fraud, charges, demands, losses, damages, obligations, liabilities, grievances, causes of action, or suits at law and equity of whatsoever kind and nature, expenses, costs and attorney fees, whether known or unknown, suspected or unsuspected, liquidated or unliquidated (each, a "Claim"), arising out of all past affiliations and transactions among Bodell, BCC and any MSF Party, including, but not limited to, the Loans and all related arrangements and transactions, **(b)** without limiting the generality of the foregoing, **acknowledges and agrees that the obligations of the MSF Parties in connection with the Loans, including all principal and interest that may have been deemed to have accrued thereon, are hereby deemed fully satisfied and repaid in full**; *provided* that such releases shall not apply to any obligation of MSF or Jenson set forth in this Agreement to be performed or observed after the execution and delivery hereof.

Ex. 64, Settlement Agreement ¶ 2 (emphasis added).

42. Just over four months after executing the Settlement Agreement, Bodell sued Bank One, claiming that it was wrongfully induced to loan money to Jenson based on the Lightner Letter. Complaint, dated July 31, 2003.

SUMMARY JUDGMENT STANDARD

Summary judgment is proper "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." *Schafir v. Harrigan*, 879 P.2d 1384, 1387 (Utah Ct. App. 1994) (citing Utah R. Civ. P. 56(c)). In addition, summary judgment should be entered if a party who fails to establish an element essential to that party's case "because the complete failure of proof on an essential element of the nonmoving party's case necessarily renders all other facts immaterial." *Id.* at 1393 (citing *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23 (1986)).

Further, "the elements of fraud . . . must be proven by 'clear and convincing evidence.'" *Crookston v. Fire Ins. Exch.*, 817 P.2d 789, 800 (Utah 1991). The same rule applies to negligent misrepresentation. *See Jardine v. Brunswick Corp.*, 423 P.2d 659, 663 (Utah 1967) (reversing judgment on claim for negligent misrepresentation because it was not proven "by the required quantum of clear and convincing evidence."). This burden applies at the summary judgment stage, meaning that a plaintiff "must be able to prove each element of fraud by clear and convincing evidence" to prevail at summary judgment. *Andalex Resources v. Myers*, 871 P.2d 1042, 1046 (Utah Ct. App. 1994). *See also Applied Genetics Int'l, Inc. v. First Affiliated Secur., Inc.*, 912 F.2d 1238, 1243 (10th Cir. 1990) (holding that "the clear and convincing standard must be considered in determining whether defendant's motion for summary judgment should have been granted on the fraud claim").

ARGUMENT

The undisputed evidence demonstrates that Bodell cannot satisfy several elements on which it must shoulder the burden of proof to establish its claims for fraud and negligent misrepresentation against Bank One.

To obtain relief on a fraud claim, a plaintiff must prove that (1) the defendant made a representation, (2) concerning a presently existing material fact, (3) which was false, (4) which the representor either (a) knew to be false, or (b) made recklessly, knowing that he or she had insufficient knowledge on which to base such representation, (5) for the purpose of inducing the other party to act upon it; and that (6) the other party, acting reasonably and in ignorance of its falsity, did in fact rely upon it to his injury. *Robinson v. Tripco Investment, Inc.*, 21 P.3d 219, 223 (Utah Ct. App. 2000).

To obtain relief on a negligent misrepresentation claim, a plaintiff must prove that (1) the defendant had a pecuniary interest in a transaction, (2) the defendant was in a superior position to know material facts about that transaction, (3) the defendant carelessly or negligently made a false representation concerning such facts, (4) the defendant expected the plaintiff to rely and act on such representation, (5) the plaintiff reasonably relied on such representation, and (6) suffered harm as a result thereof. *Jardine*, 423 P.2d at 662. Additionally, the defendant's representation must concern a past or presently existing fact, *Cerritos Trucking Co. v. Utah Venture No. 1*, 645 P.2d 608, 612 (Utah 1982), and the plaintiff must have been a foreseeable recipient of the representation. *Christenson v. Commonwealth Land Title Ins. Co.*, 666 P.2d 302, 305 n.1 (Utah 1983).

Bodell's claims for fraud and negligent misrepresentation fail because the facts unearthed in discovery establish that (1) there was no representation of a presently existing fact, (2) the representations were not false when made, (3) the reliance placed on the statements was not reasonable, and (4) there was an accord and satisfaction. The negligent misrepresentation claim fails for the additional reasons that (5) Bank One had no pecuniary interest in the alleged fraudulent transaction, (6) Bank One was not in a position superior to Bodell to know of the alleged falsity of the statements, and (7) Bodell was not the foreseeable recipient of the alleged fraudulent statements.

I. THE FRAUD AND NEGLIGENT MISREPRESENTATION CLAIMS FAIL BECAUSE THE ALLEGED MISREPRESENTATION DOES NOT RELATE TO A PAST OR PRESENTLY EXISTING FACT.

Bodell's fraud and negligent misrepresentation claims against Bank One are based on a statement in the Lightner Letter that a certain sum "will be" deposited into an account at Bank One. *See* Exhibit 14. The Lightner Letter does not contain a representation that a certain sum was on deposit with Bank One or that a loan to MadTrax was ever made. To be clear, the Lightner Letter does not contain a representation that a deposit had been verified by Bank One. Rather, it is undisputed that the only representations made in the Lightner Letter refer to funds that were believed to be loan proceeds coming from a third party, Arimex, that were merely intended to be deposited into a Bank One account. Because the alleged misrepresentation relates only to a possible future event, Bodell cannot produce evidence of an element essential to its misrepresentation claims.

In order to prevail on a fraud or negligent misrepresentation claim, the representation

must relate to a past or presently existing fact. *Robinson*, 21 P.3d at 223 (fraud); *Cerritos Trucking Co.*, 645 P.2d at 612 (negligent misrepresentation). In *Cerritos Trucking*, the Court explained that a company's representation regarding its intention to enter into a transaction was not actionable because the company was making a good faith statement about a future event. 645 P.2d at 612. The court distinguished cases in which there was a representation that clearly related to a past or presently existing fact, stating that "[d]efendants do not cite to us any case law or authority, and we are aware of none, wherein the law concerning negligent misrepresentations has been extended to fact situations involving the state of a person's mind." *Id.*

Similarly, in *Jardine*, the court explained that where the representation at issue was a statement regarding a party's ability to build and finance a commercial building in the future, such a statement "could well be understood as reflecting an opinion only." 423 P.2d at 662. The court went on to state that "there is actually no way of knowing whether [the statement of opinion] was true or false when it was made . . . ." *Id.* As in *Cerritos Trucking* and *Jardine*, the representation at issue in this case relates to the occurrence of an event in the future. Nothing in the Lightner Letter can be construed as a representation of a past or presently existing fact.

Decisions from other jurisdictions also hold that a representation relating to a future event cannot give rise to a claim for misrepresentation. For example, in *Bank of Shaw v. Posey*, 573 So.2d 1355 (Miss. 1990), the plaintiffs, customers of the defendant bank, alleged that the bank negligently misrepresented its willingness to extend future financing to the plaintiffs. In holding that the trial court should have granted the bank's motion for a directed verdict, the Mississippi

Supreme Court explained that even if the representation was made, "it was a promise of future conduct and not a statement of fact sufficient to constitute the kind of representation which would support a claim of negligent misrepresentation." *Id.* at 1360. The court continued by stating that "[i]t is well settled law that . . . the first element of the tort of negligent misrepresentation must involve a representation concerning a past or present fact," and that "*the promise of future conduct is, as a matter of law, not such a representation as will support recovery under a theory of negligent misrepresentation.*" *Id.* (emphasis added). *See also Hydro Investors, Inc. v. Trafalgar Power Inc.*, 227 F.3d 8, 20-21 (2d Cir. 2000) (defendant engineering firm's "overly optimistic estimates" to plaintiff about power plant's expected output were merely promises about *future* events as opposed to present representations of existing fact); *Murray v. Xerox Corp.*, 811 F.2d 118, 123 (2d Cir. 1987) (affirming summary judgment because alleged misrepresentations regarding employment promotions and transfers depended on future circumstances and were no more than alleged breaches of promises of future conduct); *Koontz v. Thomas*, 511 S.E.2d 407, 413 (S.C. Ct. App. 1999) (summary judgment granted because alleged breaches of plans and designs in a construction contract were subject to the defendant's future approval and, therefore, there could be no misrepresentation as to performance of the same); *City of Beaumont v. Excavators & Constructors, Inc.*, 870 S.W.2d 123, 139 (Tex. Ct. App. 1993) (company sued for inefficiency and delay damages by excavator held not liable for negligent misrepresentation because its representations about possible completion dates "were guesses as to future, unknown happenings, they were not information.").

For a representation to form the basis for a fraud or negligent misrepresentation claim,

the representation must relate to a past or presently existing fact. Statements about future events, such as the statement in the Lightner Letter regarding a future deposit that "will be" made into a Bank One account, are not actionable as a matter of law.

II. THE FRAUD AND NEGLIGENT MISREPRESENTATION CLAIMS FAIL BECAUSE BODELL CANNOT PRODUCE ANY EVIDENCE SHOWING THAT THE REPRESENTATIONS MADE IN THE LIGHTNER LETTER WERE FALSE WHEN MADE.

Bodell's fraud and negligent misrepresentation claims fail as a matter of law because the representations made in the Lightner Letter were true when made. Bodell, who bears a plaintiff's burden of proof, can not produce any evidence disputing the fact that the representations made in the Lightner Letter were true at the time they were made. The President of Bodell and the Chief Financial Officer of Bodell have even testified that they are unsure whether the statements made in the Lightner Letter are false. *See* Ex. 66, Bodell Dep. at 96-97; Ex. 67, Weight Dep. at 94. Furthermore, all that stood in the way of MadTrax receiving its $165 million from Arimex was the signature of Mark Robbins on the Arimex Loan Agreement. *See* Ex. 68, Robbins Dep. at 447-48. Arimex had executed the Arimex Loan documents and all that was necessary to consummate the loan was for Robbins/MadTrax to sign them and deliver the note to Arimex. *See id.* Clearly, at the time the Lightner Letter was purportedly written, it was contemplated that Arimex was going to loan MadTrax $165 million pursuant to the loan documents signed by Arimex as stated in the letter. Accordingly, nothing in the Lightner Letter was false when written and there are no facts to rebut this.

The misrepresentation of a fact is the most elementary requirement for a fraud or

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negligent misrepresentation claim. *Schafir v. Harrigan*, 879 P.2d 1384 (Utah Ct. App. 1994), holds that "[c]hief among [the elements of a misrepresentation claim] . . . is the requirement that one party misrepresent a material fact to the other party." *Id.* at 1393; *see also Robinson*, 21 P.2d at 223 (requiring same in fraud context). Thus in *Schafir*, where the defendants made representations as to the condition of pipes in their home, and defendants believed such representations to be true based on the information provided to them, there was no actionable misrepresentation even though plaintiffs claimed to have detrimentally relied on the representations (which later turned out to be untrue). *Schafir*, 879 P.2d at 1393.

Further, Bodell has the burden of offering evidence that the representation was false at the time it was made. It is insufficient to allege that the representation was false because facts arising after the making of the representation rendered it untrue. In *Loosle v. First Fed. Sav. & Loan Ass'n of Logan*, 858 P.2d 999 (Utah 1993), the Utah Supreme Court affirmed summary judgment in favor of a bank that was sued for negligent misrepresentation based upon its appraisal of real estate. *Id.* at 1001. Even though the value of the real estate at issue was later determined to be significantly different from the value represented in the bank's appraisal, the court explained that "plaintiffs have proffered no evidence that the [original] appraisal made by [the defendant bank] was faulty." *Id. See also Reimsnyder v. Richardson*, 846 So.2d 1264, 1266 (Fla. Dist. Ct. App. 2003) (affirming summary judgment in favor of a bank sued for negligent misrepresentation because there was no evidence that the statements of the bank representative were false at the time they were made).

There is no evidence that the representations made in the Lightner Letter were false at the

time the representations were made. As is clear from the facts existing at the time the Lightner Letter was allegedly drafted, it was anticipated that the Arimex loan was actually going to be made. Without presenting facts to dispute that the representations in the Lightner Letter were true at the time they were made, Bodell cannot establish a necessary element of its claims.

III. THE FRAUD AND MISREPRESENTATION CLAIMS FAIL BECAUSE BODELL'S RELIANCE ON THE LIGHTNER LETTER IN MAKING A $4 MILLION UNSECURED LOAN WAS UNREASONABLE.

While the question of reasonable reliance is usually a factual determination, Utah courts have held that "there are instances where courts may conclude that, as a matter of law, there was no reasonable reliance." *Larsen v. Exclusive Cars, Inc.*, 97 P.3d 714, 715 (Utah Ct. App. 2004) (citations omitted). "[I]n order to successfully bring an action for negligent misrepresentation, the [plaintiffs] must demonstrate that they at least took reasonable steps to ascertain the truth of [the defendant's] representation . . . or, worded, differently, that the [plaintiffs'] reliance on [the defendant's] statement without some further inquiry was reasonable under the circumstances." *Maack v. Res. Design & Constr., Inc.*, 875 P.2d 570, 577 (Utah Ct. App. 1994). *See also Robinson*, 21 P.2d at 223 (requiring reasonable reliance for fraud claim). Granting summary judgment for defendants, the *Maack* court held that it was unreasonable as a matter of law for homebuyers to rely on a real estate agent's representations regarding the existence of a home warranty without further due diligence by the homebuyers. Id. at 577-78. *See also Jardine v. Brunswick Corp.*, 423 P.2d 659, 662-63 (Utah 1967) ("The one who complains of being injured by such a false representation cannot heedlessly accept as true whatever is told him, but has the duty of exercising such degree of care to protect his own interests as would be exercised by an

ordinary, reasonable and prudent person under the circumstances; and if he fails to do so, is precluded from holding someone else to account for the consequences of his own neglect."); *Forsberg v. Burningham & Kimball*, 892 P.2d 23, 26 (Utah Ct. App. 1995) (same); *Brown v. Weis*, 871 P.2d 552, 564 (Utah Ct. App. 1994) (holding that because plaintiffs were sophisticated businessmen and did not conduct sufficient due diligence regarding the subject of the alleged misrepresentations, their reliance was not reasonable as a matter of law).

In a case very similar to this one, *Liggett v. Levy*, 136 S.W. 299 (Mo. 1911), the defendant bank was sued by a plaintiff alleging that it relied on a letter from the bank addressed "To Whom it May Concern." The body of the letter stated as follows: "This letter will be presented to you by J. B. Levy in the interest of the Preferred Bond and Investment Company, who are valued customers of this bank. Their business has always been very satisfactory to us and we consider them wide-awake businessmen. Any favors shown to him will be highly appreciated." Plaintiff alleged that he relied on the letter in making a loan to Mr. Levy. The court, in upholding dismissal of the plaintiff's claims, stated that:

> [the] vagueness [of the letter] indelibly stamps it on its face as an unstable and insufficient foundation for commercial credit as a borrower of money. There is no hint given by the writer of the extent or line of credit, if any, that should be given the bearer. It invites no loan at all, let alone one of the amount here [$3,000.00] . . . . In other words, reliance and faith upon the borrower's ability to repay so large a loan could not in reason spring as a natural and fair conclusion for a letter couched in the terms of this one.

Id. at 302-03 (emphasis added).

Bodell's reliance on the Lightner Letter is just as unreasonable as the reliance on the

letter in *Liggett*. Bodell characterized his reliance as follows:

> Q. Can you give me a list of the factors that you relied on that led you to the conclusion to make that loan?
> A. Well, the overwhelming one was the confirmation of funds going into their account, the source of repayment.
> Q. The letter from Mr. Lightner?
> A. Yeah.
> Q. What else?
> A. Well, the assurances from Jenson that he would see that he was -- that as soon as this money came in, he would pay us immediately.
> Q. What else did you rely on?
> A. Nothing, really.

Ex. 69, Bodell Dep. at 61. This testimony makes clear that Bodell was really relying on Jenson's characterization of the letter rather than the letter itself, which on its face was not a "confirmation of funds" and which gave no indication in any way that Jenson owned the funds (in fact the letter makes clear that they are loan proceeds) or that Jenson would have any right to direct any part of the deposit to Bodell. Quite the contrary, the letter states that the funds would be deposited into an account "in the name of the Company [*i.e.* MadTrax Group] and managed by its Members." Any reasonable person would surely have made further inquiry to satisfy himself that Jenson had the right to control the disposition of loan proceeds deposited into the account of another entity. Under these circumstances, Bodell's reliance on the Lightner Letter was not reasonable; indeed it was brazenly foolhardy.

Additional factors also establish how far-fetched Bodell's claimed reliance was. The Lightner Letter (a) was not addressed to Bodell, (b) was not intended by Bank One to be read by Bodell, (c) did not refer to the then-current status of Jenson's, Robbins', and/or MadTrax's ability to repay debts, (d) was not coupled with any supporting documentation (i.e., an executed

loan agreement from Arimex), (e) was not verified by Bodell—neither as to its authenticity nor as to the validity of the statements made therein, and (f) was from a bank with whom Bodell had no relationship and knew nothing about the author of the letter This is precisely the type of case in which the Court should decide that, as a matter of law, Bodell's reliance was unreasonable

IV. THE FRAUD AND NEGLIGENT MISREPRESENTATION CLAIMS FAIL BECAUSE THE SETTLEMENT AGREEMENT CONSTITUTES AN ACCORD AND FULL SATISFACTION OF THE CLAIMS IN THIS ACTION AS A MATTER OF LAW.

An accord and satisfaction is an agreement to give and accept some performance other than that which is actually due as full satisfaction of a claim or obligation *ProMax Dev Corp v Raile*, 998 P 2d 254, 259 (Utah 2000) Put another way, "[a]n accord and satisfaction arises when the parties to a contract agree that a different performance, to be made in substitution of the performance originally agreed upon, will discharge the obligation created under the original agreement" Id The elements of an accord and satisfaction are "(1) an unliquidated claim or a bona fide dispute over the amount due, (2) a payment offered as full settlement of the entire dispute, and (3) an acceptance of the payment as full settlement of the dispute" *Id* (citing *Marton Remodeling v Jensen*, 706 P 2d 607, 609-10 (Utah 1985))

The law is well settled that there can be but one satisfaction of a debt or obligation *See Harris-Dudley Plumbing Co v Professional United World Travel Assoc , Inc* , 592 P 2d 586, 588 (Utah 1979), *Blodgett v Zions First National Bank*, 752 P 2d 901, 903 (Utah App 1988) The rationale behind this "one satisfaction" rule is that "the wrong is single and entire, and the injured party is entitled to one, and only one, satisfaction, no matter how many parties may have

joined in the act." *Jukes v. North American Van Lines*, 309 P.2d 692, 699 (Kan. 1957); *see also Luxenburg v. Can-Tex Industries*, 257 N.W.2d 804, 807-808 (Minn. 1977) (holding that "if the injured party has accepted satisfaction in full for the injury suffered by him, the law will not permit him to recover again for the same injury . . ."). To hold otherwise would allow claimants to obtain multiple recoveries for the same injury, as Bodell attempts to do in this action.

An accord and satisfaction bars claims against third parties who are not parties to the agreement creating the accord and satisfaction. In *Luxenburg v. Can-Tex Industries*, 257 N.W.2d 804 (Minn. 1977), the Court ruled that "if the injured party has accepted satisfaction in full for the injury suffered by him, the law will not permit him to recover again for the same injury . . . ." 257 N.W.2d at 807-808. In a footnote, the Court acknowledged that an amount less than the full damages may represent "full compensation" where the lesser amount reflects a discount due to the fact that the liability is disputed. *See also*, *Havard v. Kemper National Insurance Companies*, 945 F.Supp. 953 (D. Miss. 1995) (An accord and satisfaction between the insured and the insurer discharged all claims of plaintiff and therefore plaintiff's claims against appraisers were dismissed).

When an accord and satisfaction is reached, the debt is discharged by substitute performance. There is no further question of what parties remain liable. The debt is gone. There can only be one satisfaction of an obligation. The Settlement Agreement satisfies the obligations on the loan and any tort claims.

The language of the Settlement Agreement in this case is clear and unambiguous because it is not "capable of more than one reasonable interpretation." *Winegar v. Froerer Corp.*, 813

P.2d 104, 108 (Utah 1991). There was clearly a dispute over an unliquidated sum of money that Bodell claimed to be due under certain loans to MSF which were guaranteed by Jenson. A payment was offered and accepted. The intent of the parties as to whether the $3,000,000 payment was a full settlement of the entire dispute can be readily and conclusively determined from the clear and unambiguous language of the Settlement Agreement:

> [Bodell] acknowledges and agrees that the obligations of the MSF Parties in connection with the Loans, including all principal and interest that may have been deemed to have accrued thereon, are hereby deemed fully satisfied and repaid in full;

Exhibit 64, ¶ 2. The language could not be more clear. The loan is "fully satisfied and repaid in full." There is nothing else owing on the debt by anyone.

Furthermore, Paragraph 2 of the Settlement Agreement contains two parts, designated (a) and (b). Part (a) states that Bodell releases MSF and Jenson from any and all claims and obligations, including the loans. Part (b) states that the loans are "fully satisfied and repaid in full." Obviously, Parts (a) and (b) were intended to accomplish two different things. Part (b) is not merely a release of MSF and Jenson. That was already provided in Part (a). Part (b) must have been intended to mean something different than Part (a) – there is no other way to reconcile these provisions. Part (b) provides that the debt is "fully satisfied and repaid in full." The inescapable conclusion is that there was an accord and satisfaction. Bodell cannot now assert claims against Bank One on a satisfied debt. The absence of any provision reserving rights against third parties from the Settlement Agreement further demonstrates the intent that all loans were "fully satisfied and repaid in full."

Because of the clarity of the Settlement Agreement, "extrinsic evidence need not and should be considered. *Winegar v. Froerer Corp.*, 813 P.2d 104, 108 (Utah 1991) ("A court may only consider extrinsic evidence, if after careful consideration, the contract language is ambiguous or uncertain."). There is no reservation of rights against others. The only conclusion is that claims based on the Bodell Loan are extinguished and satisfied and cannot now be asserted against Bank One or anyone else. Bodell has no remaining claims on the Bodell Loan.

V. BODELL'S NEGLIGENT MISREPRESENTATION CLAIM FAILS BECAUSE BANK ONE DID NOT HAVE A PECUNIARY INTEREST IN THE BODELL LOAN.

In order to establish a claim for negligent misrepresentation, a plaintiff must show that the defendant had a "pecuniary interest" in the transaction in which the claimant incurred its loss.[18] *Gildea v. Guardian Title Co. of Utah*, 970 P.2d 1265, 1271 (Utah 1998). In this case, there are no facts to support the proposition that Bank One somehow had a pecuniary interest in the Bodell Loan transaction. Instead, the facts are undisputed that Bank One did not even know about the Bodell Loan at the time it was made to Jenson. Ex. 70, Bodell Dep. at 56, 71, 73 (testifying that Bodell never contacted anyone at Bank One with respect to the Bodell Loan or the Lightner Letter); Ex. 57, Lightner Dep. at 39 (testifying that as of the date of the Lightner Letter, neither Lightner nor any other representative at Bank One had any knowledge of the Bodell Loan or Jenson's and/or Robbins' intention to secure the same). It is hard to imagine how Bank One could have a pecuniary interest in a loan transaction it knew nothing about.

[18] The appropriate focus of this element is the transaction in which the recipient claims to have incurred its loss. Therefore, in order to satisfy this element, Bodell must prove facts showing that Bank One had a pecuniary interest in the Bodell Loan transaction (as opposed to some other transaction).

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Furthermore, Bank One was never intended as, nor was it ever, a beneficiary—direct or otherwise—of the Bodell Loan. Ex. 61, Robbins Dep. at 449-50 (testifying that Bank One did not receive any of the $8 million that Robbins borrowed from Jenson, $4 million of which represented Jenson's loan from Bodell, nor did Bank One receive any other benefit from the Bodell Loan). There are no facts to suggest otherwise.

The Utah cases which have found a pecuniary interest are those where the defendant was itself a party to the transaction and therefore stood to gain some benefit from the consummation of the transaction. For example, in *Christenson v. Commonwealth*, 666 P.2d 302 (Utah 1983), the court explained that the alleged negligent misrepresentor—an escrow agent accused of providing inaccurate information regarding the title and status of certain properties—had a pecuniary interest in the transaction because it was paid for its services as the escrow agent. *Id.* at 305. *See also Maack v. Res. Design & Constr., Inc.*, 875 P.2d 570, 576 (Utah Ct. App. 1994) (seller's real estate agent found to have a pecuniary interest in a home sale because the agent stood to profit from the transaction and could therefore be liable for a negligent misrepresentation concerning home's warranty).

Reimsnyder v. Southtrust Bank, 846 So. 2d 1264 (Fla. Dist. Ct. App. 2003), is a case presenting facts remarkably similar to the one at bar. There, a bank was sued for negligently misrepresenting the financial condition of one of the bank's customers. Allegedly in reliance on the bank's representations, the third party invested in the company, which subsequently suffered financial setbacks costing the investor the majority of his investment. In affirming summary judgment for the bank, the court explained that because there were no facts showing that the

bank received compensation as a result of the investment, the bank could not be considered to have had a pecuniary interest in the investment transaction. *Id.* at 1267-68. The court also noted that there was no evidence that the bank had even an indirect pecuniary interest in the investment transaction, such as the repayment of a bank loan from the investment proceeds. Similarly, Bank One had nothing to gain or lose from Bodell's decision to make the loan to Jenson and/or MSF. Absent facts to establish the pecuniary interest element of its negligent misrepresentation claim, Bodell's claim against Bank One fails as a matter of law.

VI. THE NEGLIGENT MISREPRESENTATION CLAIM FAILS BECAUSE BANK ONE WAS NOT IN A "SUPERIOR POSITION" TO ASCERTAIN THE VALIDITY OR STATUS OF THE ARIMEX LOAN.

Bodell's claim for negligent misrepresentation fails as a matter of law because there are no facts demonstrating that Bank One was in a "superior position" to ascertain the truthfulness or accuracy of the representations contained in the Lightner Letter. Bank One was not a party to the Arimex loan. Bank One was only asked to be a depositary of the loan proceeds. Bank One had no relationship with Arimex. All of the due diligence, investigation and review that could be done concerning the Arimex loan was equally available to Bodell and Bank One. Bodell could have contacted Arimex, obtained references on Arimex, requested information from Robbins, and done all the other things that Bank One could have done to verify that there would be a loan from Arimex. Bank One did not have access to any information that was not equally available to Bodell. Bank one was not in a superior position to determine whether the Arimex loan would be made.

The superior position of the alleged representor is essential to a claim for negligent

misrepresentation. *See Fennell v. Green*, 77 P.3d 339, 345 (Utah Ct. App. 2003) ("[A]n effective claim for negligent misrepresentation requires that the party making the misrepresentation was in a superior position to know of the material fact."). A party with specialized skills or knowledge related to the subject matter of the representation will be considered to occupy such a position of superiority. For example, in *Price-Orem Inv. Co. v. Rollins, Brown and Gunnell, Inc.*, 713 P.2d 55 (Utah 1986), the court explained that an engineering firm is expected to have specialized knowledge when making survey representations. *Id.* at 59. Unlike the defendant in *Price-Orem*, Bank One had no additional skills or knowledge providing it with a superior ability to determine whether the Arimex Loan would be consummated. Bank One was a third-party completely unrelated to the Arimex Loan transaction and therefore was not in a "superior position" to know whether the Arimex Loan would close. After being informed by Jenson of the Arimex Loan, Bodell could have and should have inquired further and requested more information about the Arimex Loan. Instead, Bodell did nothing and chose to make a $4 million unsecured loan based on statements made by Jenson and a letter addressed "To Whom it May Concern" that stated that MadTrax and its members "will be" depositing $165 million to be loaned by Arimex to MadTrax.

Other cases hold that unless the defendant has an established relationship with the subject of the representation or access to information that the plaintiff does not, the defendant will not be considered to be in a "superior position." In *Hit Products Corp. v. Anchor Fin. Corp.*, 111 F. Supp. 2d 723 (D. S.C. 1999), for example, a bank was sued for negligent misrepresentation based on statements made by a bank representative regarding the financial condition of one the

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bank's customers. In granting the bank's motion for summary judgment, the court found that the bank was not in a superior position with respect to the representations at issue because the plaintiff had an established relationship with the bank's customer and even had knowledge regarding the customer's finances that the bank did not. *Id.* at 727-28; *cf.*, *First Interstate Bank of Texas v. S.B.F.I, Inc.*, 830 S.W.2d 239, 246 (Tex. Ct. App. 1992) (affirming finding of negligent misrepresentation where defendant bank had access to information not available to recipient).

As in *Hit Products*, Bodell had a previously-existing relationship with Jenson – they had known each other for almost 20 years, had been neighbors, and Bodell had previously lent Jenson $1 million. Ex. 40, Bodell Dep. at 10, 18-20, 31. There is no evidence to conclude that Bank One was in the superior position. Bodell's claim therefore must fail as a matter of law.

VII. BODELL'S NEGLIGENT MISREPRESENTATION CLAIM FAILS BECAUSE BODELL WAS NOT A FORESEEABLE RECIPIENT OF THE LIGHTNER LETTER.

In cases where a plaintiff alleges reliance on the negligent misrepresentations of another to its detriment, Utah law limits liability to damages suffered by parties who were reasonably foreseeable recipients of the alleged misrepresentations. This limitation is reflected in Section 552 of the Restatement (Second) of Torts, which is followed by Utah courts. *See Christenson v. Commonwealth Land Title Ins. Co.*, 666 P.2d 302, 305 n.1 (Utah 1983). Section 552 states, in relevant part, that liability for a negligent misrepresentation is "limited to loss suffered . . . by the person or one of a limited group of persons for whose benefit and guidance [the representor] intends to supply the information or knows that the recipient intends to supply it." *Id.* (citing

§ 552 of the Restatement (Second) of Torts (1977)). Therefore, in order for Bodell to succeed on its claim for negligent misrepresentation, Bodell must show that it was intended by Bank One to be a recipient of the Lightner Letter or that Bank One knew the intended recipient would supply the Lightner Letter to Bodell. *See Price-Orem Inv. Co. v. Rollins, Brown and Gunnell, Inc.*, 713 P.2d 55, 59-60 (Utah 1986) (requiring foreseeability of injured party as an element of a negligent misrepresentation claim).

Robbins was adamant in his testimony that the Lightner Letter was intended solely for Lincoln Partners, the investment advisor for Brunswick Corporation, and not for anyone else. ¶11, Statement of Undisputed Material Facts. Bank One had no knowledge whatsoever about the existence of Bodell or the contemplated Bodell Loan. ¶¶ 32-26, Statement of Undisputed Material Facts. There is no other evidence on this issue. Clearly Bodell was not a foreseeable recipient of the Lightner Letter. It is worth noting again that Lightner had absolutely no knowledge of Bodell, the Bodell Loan, or Jenson's solicitation of the same. Ex. 71, Lightner Dep. at 39 (testifying that as of the date of the Lightner Letter, neither Lightner nor any other representative at Bank One had any knowledge of the Bodell Loan or Jenson's and/or Robbins' intention to secure the same). Furthermore, the purpose of the Lightner Letter was to confirm MadTrax's financial ability to acquire a large bicycle company, not to be used to solicit funds from third parties such as Bodell. Ex. 21, Robbins Dep. at 226. Finally, the Lightner Letter reached Bodell only because Robbins (who requested the letter for Lincoln Partners), gave the letter to Jenson, who in turn gave the letter to Bodell. Thus, it was unforeseeable that even Jenson, let alone Bodell, would receive (and then further distribute) the Lightner Letter. Because

these undisputed material facts demonstrate both that Lightner had no knowledge of Bodell or the Bodell Loan and that Bodell was not a foreseeable recipient of the Lightner Letter, Bodell cannot establish an essential element of its claim against Bank One.

This case contrasts sharply from those in which courts have found that the recipient was foreseeable. In those cases, the recipient was known to the defendant and was an intended recipient of the representations at issue. For example, in Christenson, the court explained that because the recipient had requested information regarding the title of certain properties from the defendant title company, the defendant knew that the recipient would receive and therefore likely rely on the representations at issue. 666 P.2d at 306. Similarly, in *Price-Orem Inv. Co.*, the court found that a property owner was considered to be a reasonably foreseeable recipient of a survey relating to the owner's property. 713 P.2d at 60. In this case, Bodell did not request the Lightner Letter and Bank One knew nothing of Bodell as of the date Jenson showed the letter to Bodell.

The facts of the instant case fall closely in line with decisions finding no foreseeability. *See e.g. Ballance v. Rinehart*, 412 S.E.2d 106, 107-08 (N.C. Ct. App. 1992) (real estate appraisal was prepared for a specific bank and because the appraiser did not know that the home owner would show the appraisal to potential buyers, the appraiser could not be held liable by the home buyer for representations made in the appraisal); *Beall Plumbing & Heating Co. v. First Nat'l Bank of Keystone*, 847 F. Supp. 1307, 1315 (S.D. W. Va. 1994) (granting summary judgment in favor of the defendant bank on a negligent misrepresentation claim because the plaintiff was not the intended recipient of a certificate relating to a bank customer); *Goldman Serv. Mech.*

Contracting, Inc. v. Citizens Bank & Trust Co. of Paducah, 812 F. Supp. 738, 743 (W.D. Ky. 1992) (same).

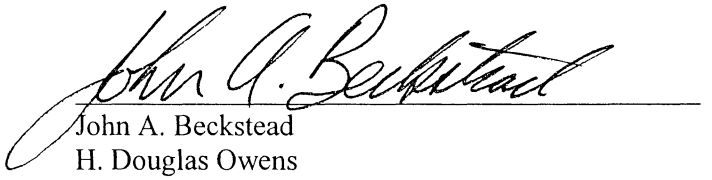
Because Bodell cannot bring forth any evidence to show that it was an intended or foreseeable recipient of the Lightner Letter, the Court must grant summary judgment in favor of Bank One as a matter of law.

CONCLUSION

For the foregoing reasons, summary judgment should be granted in favor of Bank One on both the fraud and negligent misrepresentation causes of action (as well as on the pending summary judgment motion of Bank One on the fraud claim), the Complaint dismissed upon the merits, and Bank One awarded its costs.

Dated this 2nd day of July, 2007.

HOLLAND & HART LLP



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CERTIFICATE OF MAILING

I certify that on July 2nd , 2007, I served a copy of the foregoing document to the following by:

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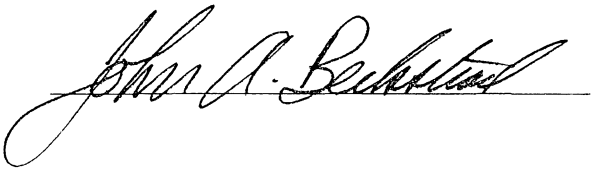

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Tab 7

ORIGINAL

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IN THE THIRD DISTRICT COURT,

SALT LAKE COUNTY, STATE OF UTAH

BODELL CONSTRUCTION COMPANY, a Utah corporation Plaintiff, vs. MARK H. ROBBINS; CHEROKEE & WALKER INVESTMENT COMPANY, L.L.C., a Utah limited liability company; CHEROKEE AND WALKER, L.L.C., a Utah limited liability company; BANK ONE, UTAH, National Association, a Utah corporation; and DOES 1 through 50, Defendants.	**PLAINTIFF BODELL CONSTRUCTION COMPANY'S MEMORANDUM IN OPPOSITION TO BANK ONE'S MOTION FOR SUMMARY JUDGMENT** Civil No. 030917018 Judge John Paul Kennedy

Plaintiff Bodell Construction Company ("Bodell") will respond in this memorandum to the arguments asserted by Defendant Bank One in support of its third motion for summary judgment.

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I. INTRODUCTION

In early 2000 Defendant Mark Robbins ("Robbins") sold 50 percent of his bicycle operation to Cherokee & Walker ("C&W"), a private equity firm, in exchange for a $4.5 million personal loan and a $500,000 capital contribution in Robbins's bicycle companies (collectively "Vtrax"). The marriage never had a chance. Robbins failed to provide information to C&W about the operation of Vtrax, and made important business decisions without the knowledge or consent of C&W. Only weeks after entering into their partnership both C&W and Robbins wanted out. By early May 2000 the parties had an agreement providing that Robbins would repurchase C&W's interest in Vtrax and repay the personal loan. The problem was that Robbins did not have $8 million, which he promised to pay C&W. Over the next several months, Robbins continuously missed payment deadline after payment deadline. C&W became increasingly impatient and aggressive with Robbins, anxious to recover its investment before Vtrax collapsed - which C&W believed to be the direction in which Robbins and Vtrax were headed.

C&W could not have known at the time how accurate their predictions were. Vtrax was falling apart as it was dramatically under-capitalized at the same time Robbins was hiring relatives and close friends at hugely inflated salaries. Because of its financial condition, Vtrax was unable even to perform on any purchase orders it received for bicycles.

During the same period, Robbins learned that Brunswick Corporation was auctioning its bicycle division, together with its popular "Mongoose" brand. Robbins had dreams of acquiring

Mongoose. He secretly created a new "group" to pursue the acquisition of Mongoose without the knowledge of C&W. Robbins needed to maintain control of his bicycle company in order to be a legitimate candidate in the Mongoose auction. For this reason, he could not afford to have C&W seize control of his bicycle companies. He also wanted to buyout C&W so that in the unlikely event he was the successful bidder for Mongoose, he would not have to share the spoils of his new acquisition.

By early August, C&W (unaware of the Mongoose auction) was finished with Robbins's broken promises. C&W retained attorneys and set in motion the legal process to seize control of Vtrax under the terms of the initial lending agreements with Robbins. Robbins became desperate to get $8 million to payoff C&W and get them out of the picture before literally everything collapsed. Robbins needed someone to help him get other people's money with which he could payoff C&W. That someone was Bank One and specifically its officer Benjamin Lightner ("Lightner') who assisted Robbins by preparing and signing letters from the Bank making outrageous false representations concerning Robbins' wherewithal and Robbins' access to large sums of money from which to repay the people Robbins was trying to draw into his transactions. One of the false letters written by Lightner and Bank One is a letter addressed "To Whom it May Concern." That letter was provided to Bodell for the purpose of convincing Bodell to make a $4 million loan it had been considering, but which it had not yet committed to make due to the large sum of money involved. Bodell reasonably relied on the letter from Bank One and its officer,

and made a $4 million loan to Robbins' partner, Marc Jenson ("Jenson") for and on behalf of Robbins.

Bodell brings the instant action against Bank One for fraud and negligent misrepresentation for its assistance in and complicity with this scheme to cause Bodell to lend the $4 million that Robbins needed in August 2000. At the outset of its motion for summary judgment, Bank One faces some overwhelming problems. First, there are substantial facts demonstrating that Bank One and Lightner knew or reasonably should have known that Bodell or other potential lenders would see and rely on the letter to lend money to Robbins that Bank One knew he needed and was trying to raise. Most importantly, however, Bank One does not dispute that the letter was authored and signed by its officer Lightner. The Bank does not dispute Lightner provided the letter to Robbins, nor does the Bank dispute that the letter contains substantial false representations.

As will be shown below, Bank One has not begun to meet its burden to establish the absence of genuine issues of material fact. What the evidence will show is that not only did Lightner and Bank One provide Robbins the "To Whom it May Concern" letter, which allowed Jenson and Robbins to trick Bodell into lending $4 million, but the evidence will show that literally at every point in Robbins' high flying scheme, Bank One and Lightner were there to assist with letters of confirmation making outrageous false representations to help Robbins pursue his unrealistic goals.

Further, it will be undisputed that Bank One had, was required by law to have, and did not produce in this litigation substantial volumes of banking records and files relating to Robbins, Jenson, and their transactions which form the core of this case. Worse, Bank One will not tell Bodell or the Court what it did to try to locate the volumes of missing documents it either lost or destroyed. All of this gives rise to the negative inference, as a matter of law, that had those documents which were undisputedly in the exclusive custody and control of Bank One been produced, they would have supported the allegations by Bodell against Bank One. Fortunately, substantial other evidence has been obtained which paints a surprisingly clear picture of the Bank's participation and complicity in the scheme and for which a reasonably jury likely will hold them accountable.

Bank One's third motion for summary judgment must be denied.

II. RESPONSE TO BANK ONE'S STATEMENT OF UNDISPUTED FACTS.

Bodell responds here to each discrete numbered paragraph in Bank One's statement of undisputed facts. Where Bodell admits facts below, it does so only for the purpose of responding to the instant motion, and under a reservation of right to challenge these or other facts at trial or in other briefing.

For the convenience of the Court and the parties, cites to depositions throughout this brief may be found attached as the corresponding exhibits listed here:

Trevor Larsen - Exhibit A
Mark Robbins - Exhibit B
David Babcock - Exhibit C

Benjamin Lightner - Exhibit D
Michael Bodell - Exhibit E
Gregg Christensen - Exhibit F
Marc Jenson - Exhibit G
Susan Wilson - Exhibit H
Robert Brown - Exhibit I
David Houser - Exhibit J
Michael Petersen - Exhibit K
Susan Mayo - Exhibit L
Merrill Weight - Exhibit M

Defendant Bank One's Statement of Undisputed Material Facts	**Plaintiff Bodell Construction Company's Response to Statement of Undisputed Facts**
1. Defendant Mark Robbins was involved in the bicycle business. In 1998, Mark Robbins and others formed Wasatch Cycle, Inc. ("Wasatch Cycle"), which designed, sold and distributed bicycles to LDS missionaries. In 2000, Robbins started a company known as Vtrax Sports LLC ("Vtrax Sports"). Vtrax's plan was to sell and distribute high-end bicycles through various channels, including large mass-merchandisers like Sears and Wal-Mart. Also in 2000, Robbins founded a company called madwagon.com LLC (sometimes referred to in the Robbins deposition as Madwagon, LLC) which attempted to sell bicycles on college campuses and via the Internet.	1. Undisputed.
2. In the summer of 2000, Robbins also began pursuing an opportunity to buy the Mongoose Bicycle Division from Brunswick Corporation. Robbins formed a company called MadTrax Group LLC ("MadTrax") to pursue this acquisition. He sent letters on behalf of MadTrax confirming its interest in the acquisition.	2. Partially disputed. There is no evidence in the record that MadTrax was ever formally organized. To the contrary, the evidence is that MadTrax was merely an "idea" hatched by Robbins in 2000. (*See, e.g.*, Larsen Depo. at 19:6 - 20:12; 22:19-24; 118:1-8; 123:17-25.)

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3. In response, Brunswick required MadTrax to agree to maintain the confidentiality of the materials Brunswick provided to enable MadTrax to evaluate the Mongoose Bicycle Division.	3. Undisputed.
4. In addition, on August 9, 2000, Lincoln Partners, the investment banking firm representing Brunswick in the sale of the Mongoose Division, sent a letter to Trevor Larson, MadTrax CFO, asking for, among other things, "a description of your sources and level of financing for the proposed transaction."	4. Undisputed.
5. Robbins was a client of Bank One's private banking services at this time. Bank One employee Benjamin Lightner was Mr. Robbins' private banker. Robbins testified that in August 2000, he had conversations with Lightner about the fact that "Lincoln Partners and all of the investment bankers were, you know, looking for verification of funding and stuff like that." Robbins testified that he asked Lightner to draft a letter for Lincoln Partners regarding potential funding sources for MadTrax.	5. Partially disputed. Robbins so testified, but the evidence overwhelmingly establishes that the letter Robbins requested of Bank One on or about August 22, 2000 was not intended for Lincoln Partners. (*See* Bodell's Statement of Additional Material Facts at ¶¶ 1-49; 74-78; and 98-104.)
6. One of Robbins' potential funding sources for the Mongoose acquisition was a loan from Arimex Investments, Ltd. ("Arimex"). Robbins (with Lightner in attendance on at least one occasion) had discussions with Arimex about a potential loan.	6. Partially disputed. Arimex was never a legitimate funding source for the Mongoose acquisition. There was at no time a fully executed loan agreement between MadTrax and Arimex. (Robbins Depo. at 331:16 - 332:1.) Members of the MadTrax team working on the Mongoose acquisition testified that Arimex was not something MadTrax wanted to be involved with. (Larsen Depo. at 188:14-25.) David Babcock, president of Vtrax and part of the MadTrax team described the meeting with

	Arimex as "crazy." (Babcock Depo. at 81:22 - 82:10.) Babcock did not believe anything would come from the meeting. (Babcock Depo. at 140:25 - 141:5.) Babcock and Trevor Larsen, chief financial officer of Vtrax and member of the MadTrax team working on the Mongoose acquisition, had a discussion after meeting with Arimex about the fact that Arimex was not a company that could do anything for MadTrax. (Larsen Depo. at 189:14-22.) Moreover, the Arimex loan proposal required before any loan to MadTrax that MadTrax first establish and deposit into an escrow account $16.5 million, which neither Robbins nor MadTrax had at its disposal. (*See* Arimex Agreement, attached as Exhibit 1 at ¶ 1.6; Arimex Escrow Agreement with MadTrax and Bank One, attached as Exhibit 2; Robbins Depo. at 266:23 - 269:16.) Larsen testified that number was "just too big" for MadTrax. (Larsen Depo. at 223:13-21.) MadTrax never had any assets, never had any bank accounts, was never capitalized and never had any cash flow. (Larsen Depo. at 126:15 - 127:7.) Robbins himself concedes MadTrax had no assets of its own. (Robbins Depo. at 204:16-20.) Even if Arimex had been a legitimate source of financing for the Mongoose acquisition, Robbins had decided not to use Arimex, but instead decided to pursue financing with Unisource Cap. (Robbins Depo. at 306:13-23.)
7. Robbins claims that Lightner produced a letter dated August 22, 2000 in response to the request regarding funding sources. The letter reads:	7. Undisputed, though the evidence overwhelmingly establishes that Robbins did not request the August 22, 2000 letter as a response to Lincoln Partners' request for information concerning financing for the

To: Whom it May Concern Re: Mad Trax Group, LLC MadTrax Group, LLC (the "Company") and its individual members Mark Robbins and Marc Jenson (the "Members") will be depositing $165,000,000 into Bank One, Utah NA. The funding is coming from a loan agreement between MadTrax Group, LLC, a Utah limited liability company and Arimex Investments, LTD., a Bahamian corporation. The sum of $165,000,000 will be deposited into an interest bearing account in the name of the Company and managed by its Members. Should you have any questions with respect to this matter, please contact the Undersigned. Ben Lightner Wealth Advisor Private Banking Group	Mongoose bid. (*See* Response to ¶ 5, above.)
8. As of the date of the Lightner Letter, Robbins believed that Arimex was willing and able to make the Arimex Loan to MadTrax as described in the letter. Indeed, a loan agreement had been signed by Arimex.	8. Disputed and irrelevant. The loan agreement produced by Robbins purportedly bearing the signature of Arimex's officer is devoid of foundation. Not one witness in this case has identified the signature or otherwise provided foundation for the document. Accordingly, the document cannot support a motion for summary judgment and must be disregarded. Moreover Robbins's belief about the ability of Arimex to perform is irrelevant, lacks foundation and is inadmissible for the proposition offered. Robbins himself admits he is unable to recall any due diligence performed concerning

	Arimex's ability to perform. (Robbins Depo. at 447:14-23.) Accordingly, it must re disregarded. Notably, there is no testimony or evidence in this case concerning the ability of Arimex to fund a $165 million loan, even if MadTrax wished to pursue the loan.
9. At all times, Robbins believed that Arimex would fund the Arimex Loan if Robbins asked Arimex to do so.	9. Disputed and irrelevant. See generally the response to Paragraph 8. Robbins's subject belief is not admissible evidence concerning whether or not Arimex would have funded a $165 million loan if asked to do so, or even whether Arimex was capable of funding such a loan. Accordingly, this alleged "fact" may not support a motion for summary judgment and must be disregarded.
10. Bank One was not a party to the Arimex Loan Agreement. Ex. 17, Arimex Loan Agreement.	10. Disputed. Attached as Exhibit 1 is what Robbins offers in support of his motion for summary judgement as a draft loan agreement between Arimex and MadTrax and purportedly bearing the signature of Arimex's officer. Paragraph 1.6 of the Agreement refers to and incorporates by reference an escrow agreement (attached hereto as Exhibit 2) between MadTrax, Bank One and Arimex. The escrow agreement provides that Bank One had agreed to serve as escrow agent both for a $16.5 million deposit by MadTrax, and a subsequent $165 million deposit by Arimex. (*Id.*) Bank One is listed in the "Notices" section of the agreement, and a signature line is provided for William Jennings, escrow agent for Bank One. (*Id.*) Bank One's corporate designee testified the escrow agreement was a document prepared by Bank One. (Lightner Depo. at 162:24 - 163:2.) To that end, Lightner and Bank One had discussions with Robbins about Bank One

	serving as escrow agent for the proposed transaction. (Lightner Depo. at 164:1-8; Robbins Depo. at 326:21 - 327:4.)
11. The Lightner Letter was intended for Lincoln Partners in connection with the proposed Mongoose acquisition, and was not intended for other potential investors or for use in any other transaction.	11. Disputed. The evidence overwhelmingly establishes that Robbins and Bank One intended the letter for potential financiers, specifically including Bodell. (*See* Statement of Add'l Material Facts at ¶¶ 1-49; 74-78; 98-104.)
12. On September 27, 2000, Lincoln Partners informed Trevor Larson that Brunswick "would like to invite [MadTrax] to submit a proposal to acquire [Mongoose.]" Ex. 20, September 27, 2000 Letter from Lincoln Partners to V-Trax.	12. Undisputed.
13. MadTrax hired Duff & Phelps to assist in its efforts to bid for the Mongoose Division, but despite help from Duff & Phelps, and despite making several offers for Mongoose ranging from $63 million to $76.6 million, MadTrax was not the winning bidder and was therefore unable to make the purchase.	13. Partially disputed. There are many reasons why MadTrax could not perform the proposed purchase of Mongoose, including the fact that at the time the bidding ended MadTrax had obtained no firm commitments for funding the purchase and MadTrax had no assets of its own with which to make the purchase. (*See e.g.*, Statement of Addt'l Material Facts, ¶¶ 79, 85-87, 89-93, and 95-97; Letter from GE Capital sent with preliminary term sheet, letter attached as Exhibit 3.)
14. There is no other evidence in the record concerning the intent or expectation of Bank One concerning the use to be made of the Lightner Letter.	14. Disputed. There is overwhelming evidence that Bank One intended or could reasonably expect a class of potential investors, including Bodell, would see and rely on the Bank One letter. (*See* Statement of Addt'l Material Facts, ¶¶ 1-49, 74-78, and 98-104.)
15. In 2000, around the same time he was working on the potential Mongoose	15. Undisputed.

transaction, Robbins was also working on a transaction through which he would purchase the 50% interest in Wasatch Cycle, Madwagon, and Vtrax owned by Cherokee & Walker LLC ("Cherokee & Walker").	
16. Cherokee & Walker had purchased its 50% interest in these companies on January 7, 2000. Ex. 30, January 7, 2000 Membership Interest Purchase Agreement.	16. Undisputed.
17. By June 10, 2000, Robbins and Cherokee & Walker had negotiated an agreement through which Robbins would repurchase Cherokee & Walker's 50% interest for approximately $8 million. Ex. 32, June 10, 2000 Purchase and Settlement Agreement.	17. Undisputed, though this was not the first agreement between Robbins and Cherokee & Walker concerning the proposed buyout. (*See* Statement of Addt'l Material Facts, ¶¶ 1-12.)
18. Robbins needed to borrow or raise the $8 million to pay Cherokee & Walker, and ultimately identified an individual named Marc Jenson as a potential source of funds for the Cherokee & Walker buyout.	18. Undisputed.
19. Jenson was in the business of borrowing funds and then loaning those funds to others. Jenson profits on the difference between the interest he pays to borrow the money and the interest he receives from lending the money.	19. Undisputed.
20. In mid-2000, Jenson met Robbins and learned that Robbins needed $8 million to buy out Cherokee & Walker's interest. After negotiations, Jenson agreed to loan Robbins the $8 million.	20. Undisputed.
21. Jenson's plan was to fund the Robbins loan with $4 million of Jenson's own money and $4 million from someone else.	21. Undisputed.

Accordingly, Jenson approached Mike Bodell, president of Bodell Construction Company, about the possibility of borrowing $4 million that Jenson would, in turn, loan to Robbins for the Cherokee & Walker buyout.	
22. Bodell had known Jenson for nearly twenty years, and had previously lent Jenson $1 million.	22. Undisputed.
23. Jenson testified that he received a copy of the Lightner Letter from Robbins. Jenson, however, had no discussions with Robbins regarding what Jenson intended to do with the letter.	23. Partially disputed. Jenson believes he told Robbins that he intended to show the letter to Bodell. Moreover, the evidence overwhelmingly supports the inference that Robbins, Jenson and Bank One conspired to obtain the letter from Bank One for the specific purpose of convincing Bodell to agree to loan $4 million to Jenson, who would in turn combine Bodell's $4 million with $4 million of his own to make an $8 million loan to Robbins. (*See* Statement of Addt'l Material Facts, ¶¶ 1-49, 74-78, and 98-104.)
24. Jenson likewise recalls no discussions with Lightner, or anyone else at Bank One, about the letter and was not involved in requesting that it be drafted. Nevertheless, as part of the discussion between Jenson and Bodell, Jenson provided a copy of the Lightner Letter to Bodell.	24. Partially disputed. As noted, the evidence overwhelmingly supports the inference that Robbins, Jenson and Bank One conspired to obtain the letter from Bank One for the specific purpose of convincing Bodell to agree to loan $4 million to Jenson, who would in turn combine Bodell's $4 million with $4 million of his own to make an $8 million loan to Robbins. (*See* Statement of Addt'l Material Facts, ¶¶ 1-49, 74-78, and 98-104.)
25. Prior to making the Bodell Loan, no representation was made to Bodell that the $165 million deposit described in the Lightner Letter had been made.	25. Undisputed, but Bodell's complete response to Bank One's Request for Admission No. 5 further provides: "Bodell admits that prior to making the $165 million

	Bodell Loan, no specific representation was made to Bodell that the $165 million deposit described in the Lightner Letter had been made. However, the letter from Bank One states as a matter of fact that the $165 million will be deposited in Bank One and then further makes the direct objective representation 'The funding is coming from a loan agreement between MadTrax Group LLC, a Utah limited liability company and Arimex Investments, LTD, a Bahamian company. The sum of $165 million will be deposited into an interest bearing account in the name of the Company and managed by its Members.' [] Those direct objective representations clearly confirm that Bank One has done the confirmation necessary to make those representations."
26. Bodell testified that he does not know whether the representations made in the Lightner Letter were false when made.	26. Undisputed but irrelevant. Moreover, Bodell provided that testimony early in discovery in this case, before Bodell had an opportunity to examine Defendants about the facts and circumstances underlying the Lightner Letter and the false statements contained therein. The testimony and evidence later obtained in discovery plainly establishes that the Lightner Letter contains material false representations and omits other facts plainly material to a party like Bodell considering whether or not to make a loan based upon the representations in the Letter. Bank One itself concedes the Lightner Letter contains false representations and that Bank One had no basis for many of the representations in the Letter. (*See* Statement of Addt'l Material Facts, ¶¶ 46 - 59.)
27. Bodell Construction Company's Chief	27. Undisputed but irrelevant. Moreover,

Financial Officer, Merrill Weight, testified that as far as he knows, the Lightner Letter is a "valid letter."	Weight provided that testimony early in discovery in this case, before Bodell had an opportunity to examine Defendants about the facts and circumstances underlying the Lightner Letter and the false statements contained therein. The testimony and evidence later obtained in discovery plainly establishes that the Lightner Letter contains material false representations and omits other facts plainly material to a party like Bodell considering whether or not to make a loan based upon the representations in the Letter. Bank One itself concedes the Lightner Letter contains false representations and that Bank One had no basis for many of the representations in the Letter. (*See* Statement of Addt'l Material Facts, ¶¶ 46-59.)
28. Bodell did not contact Bank One to verify the contents of the Lightner Letter.	28. Undisputed.
29. Similarly, Bodell did not conduct any due diligence relating to Arimex or its principals.	29. Disputed. Bodell performed due diligence in connection with the loan. Among other things, Jenson reported to Bodell that Jenson and the other parties had done their due diligence and legal work on the transaction and Bodell knew that Jenson was putting up $4 million of his own money to match Bodell's $4 million. (Bodell Depo. at 45:15-24; 52:9 - 53:12.) Jenson stated his attorneys had "checked out" the transaction. (Bodell Depo. at 52:6 - 53:12.) Bodell had previously performed due diligence concerning Jenson and Jenson's business, including meetings with Jenson concerning Jenson's borrowers, repayment, collateral on loans Jenson made, and the like. (Bodell Depo. at 29:3 - 30:8.) Bodell also had discussions about Jenson with others,

	including Jim Morse, with whom Bodell has done business. (Bodell Depo. at 33:16 - 34:13.) Bodell had additional meetings with Jenson to learn about the purpose for the proposed $4 million loan and the source of funds for repayment. (Bodell Depo. at 42:12 - 49:12.) Bodell also requested and obtained from Jenson a personal financial statement. (Bodell Depo. at 48:11-23.) Jenson also provided Bodell copies of financial statements for some of Robbins' bicycle companies showing "many millions" in value. (Bodell Depo. at 56:22 - 59:14.) Jenson also provided the Lightner Letter as evidence that the loan with Arimex was a "done deal" and that $165 million would be coming in within 30 days. (Bodell Depo. at 49:4 - 50:7.) Bodell testified he relied on the Bank One letter as part of his due diligence concerning the Arimex transaction. (Bodell Depo. at 55:25 - 56:12.)
30. On August 30, 2000, Bodell Construction Company loaned $4 million to MSF Properties, LC (a company owned by Marc Jenson) and obtained a personal guaranty from Jenson. Bank One was not a party to this loan.	30. Undisputed.
31. The terms of the Bodell Loan required Jenson to pay a loan fee of $80,000 and to pay interest of 1% per week or 52% per year. The loan was due in 30 days.	31. Undisputed.
32. At the time of the Lightner Letter, Bodell had no relationship whatsoever with Bank One. Neither he nor his company was a customer and they had no accounts at Bank One. Bodell does not even know who Bank One employee Lightner is. Before making the	32. Undisputed.

loan to Jenson, Bodell never contacted Lightner or anyone else at Bank One.	
33. Similarly, while Lightner was aware that Robbins and Jenson had some sort of business relationship, Lightner recalls no discussions about Jenson loaning Robbins $8 million in connection with his bicycle business.	33. Partially disputed. Lightner was the private banker for both Robbins and Jenson. (Lightner Depo. at 111:03 - 115:07.) Lightner had frequent and regular communications with Robbins during 2000. (Lightner Depo. at 10:14-17.) Lightner knew Robbins and Jensen were partners who did business deals on a handshake. (Lightner Depo. at 199:24 - 200:3.) Robbins was also a personal friend of Lightner's and offered Lightner a job while Lightner was employed by Bank One. (Lightner Depo. at 320:1-7; 109:19 - 110:2.) Lightner understood that Cherokee & Walker owned part of at least one of Robbins' companies. (Lightner Depo. at 107:20 - 108:5.) Cherokee & Walker and Robbins had co-guaranteed a Bank One loan to one of the companies. Lightner had meetings with Cherokee & Walker talking about what their company was doing. (Lightner Depo. at 203:11-16.) In the summer of 2000 Robbins sought to reacquire Cherokee & Walker's 50 percent interest in their joint bicycle venture. (Robbins Depo. at 145, 150-52.) Lightner understood that Robbins was acquiring Cherokee & Walker's interest. (Lightner Depo. at 310:1-5.) Lightner knew Robbins received money from Jenson in 2000, testified he did not know what Robbins did with the money, but stated that Robbins may have paid off Cherokee & Walker's interest in the company they jointly owned. (Lightner Depo. at 259:16 - 260:11.) Lightner obtained that information from either Robbins or Cherokee & Walker. (Lightner Depo. at 260:12-16.) Lightner remembered taking checks to

	Cherokee & Walker at the direction of Robbins or Jenson. (Lightner Depo. at 40:17 - 41:3.) During this period Robbins was in contact with Lightner both in person and on the phone several times a week. (Robbins Depo. at 319:11-18.) Robbins kept Lightner informed about "what was going on" with the Arimex transaction. (Robbins Depo. at 326:15 - 20.) Robbins testified that he and Lightner "were in constant contact with each other about what was going on." (Robbins Depo. at 330:13-23.) Moreover, as shown below, the evidence in this case strongly supports the conclusion that Lightner wrote the August 22, 2000 letter at Robbins' request for the express purpose of inducing Bodell to loan $4 million to Jenson, so that Jenson could fulfill his commitment to loan $8 million to Robbins for the purpose of buying out Cherokee & Walker's interest in their joint bicycle venture with Robbins. (*See* Statement of Addt'l Material Facts at ¶¶ 1-49, 74-78 and 98-104.)
34. Bank One knew nothing about Bodell, or the loan that Bodell planned to make to Jenson, and had no discussions with Jenson about Bodell or Bodell Construction.	34. Partially disputed. The evidence in this case strongly supports the conclusion that Lightner wrote the August 22, 2000 letter at Robbins' request for the express purpose of inducing Bodell to loan $4 million to Jenson, so that Jenson could fulfill his commitment to loan $8 million to Robbins for the purpose of buying out Cherokee & Walker's interest in their joint bicycle venture with Robbins. (*See* Statement of Addt'l Material Facts at ¶¶ 1-49, 74-78 and 98-104.)
35. Indeed, when asked directly about whether he knew where Jenson was getting money to loan to Robbins so that Robbins	35. Disputed. Lightner so testified, but the evidence in the case stronly supports the conclusion that Lightner wrote the August 22,

could buy out Cherokee & Walker, Lightner responded that he had "no idea." Lightner further testified that "I wouldn't know [Bodell] if he walked in here today."	2000 letter at Robbins' request for the express purpose of inducing Bodell to loan $4 million to Jenson, so that Jenson could fulfill his commitment to loan $8 million to Robbins for the purpose of buying out Cherokee & Walker's interest in their joint bicycle venture with Robbins. (*See* Statement of Addt'l Material Facts at ¶¶ 1-49, 74-78 and 98-104.)
36. None of the funds from the Bodell Loan were paid to Bank One or were for Bank One's benefit.	36. Disputed. Bank One had agreed to serve as the escrow agent on for the Arimex loan transaction. (*See* Response to Paragraph 10, Bank One's Statement of Undisputed Facts.) Bank One stood to benefit financially if Robbins accepted the Arimex loan proposal. Before that could happen, Robbins first wanted to buyout Cherokee & Walker's interest in their joint bicycle venture. (*See* Statement of Addt'l Material Facts, ¶¶ 1-49.) The $4 million loan from Bodell was used for that purpose. (Robbins Depo. at 381:6-12; 391:11-13.)
37. Jenson failed to repay the Bodell Loan.	37. Undisputed.
38. For many months, Bodell sought repayment from Jenson—sometimes going so far as to make hourly calls to Jenson. Jenson made several preliminary payments on the note.	38. Partially disputed. Jenson only ever made one payment, on May 2, 2001, in the amount of $250,000, on the $4 million loan. (*See* Expert Report of Merrill Weight, attached as Exhibit 4, and Exhibit 10 thereto; Weight Depo. at 98:17 - 99:2; 103:14 - 104:6.)
39. Finally, on or about March 18, 2003, Bodell and Jenson entered into a Settlement Agreement (the "Settlement Agreement").	39. Undisputed.
40. Pursuant to the Settlement Agreement, Jenson paid Bodell $3 million and Bodell accepted those funds as payment in full of the	40. Partially disputed. As the Court has already determined, Jenson paid Bodell $3 million pursuant to the terms of the settlement

Bodell Loan.	agreement, in exchange only for a release of Bodell's claims against Jenson. (*See* March 18, 2003 Settlement Agreement, attached as Exhibit 5.)
41. Paragraph 2 of the Settlement Agreement states: Each of Bodell and BCC [Bodell Construction Company], for himself, itself, their affiliates and for all persons or entities claiming by, through or under him, it or them, hereby **(a) releases, acquits, waives and forever discharges MSF**, its affiliates and their respective members, managers, officers, employees and agents (each, including without limitation Jenson, an "MSF Party") from any and all claims, allegations of fraud, charges, demands, losses, damages, obligations, liabilities, grievances, causes of action, or suits at law and equity of whatsoever kind and nature, expenses, costs and attorney fees, whether known or unknown, suspected or unsuspected, liquidated or unliquidated (each, a "Claim"), arising out of all past affiliations and transactions among Bodell, BCC and any MSF Party, including, but not limited to, the Loans and all related arrangements and transactions, **(b)** without limiting the generality of the foregoing, **acknowledges and agrees that the obligations of the MSF Parties in connection with the Loans, including all principal and interest that may have been deemed to have accrued thereon, are hereby deemed fully satisfied and repaid in full**; *provided* that such releases shall not apply to any obligation of MSF or Jenson set forth in this Agreement to	41. The Settlement Agreement speaks for itself. The effect in this case of the cited language has already been determined by the Court. (*See* Judge Bohling's March 15, 2004 Order, attached as Exhibit 6.)

be performed or observed after the execution and delivery hereof.	
42. Just over four months after executing the Settlement Agreement, Bodell sued Bank One, claiming that it was wrongfully induced to loan money to Jenson based on the Lightner Letter.	42. Partially disputed. Bodell's claims in this case include considerably more than just that Bodell was wrongly induced to loan money to Jenson based on the Lightner Letter. (*See* First Amended Complaint, attached hereto as Exhibit 7.)

III. STATEMENT OF ADDITIONAL MATERIAL FACTS

1. In late 1999 Mark Robbins ("Robbins") was the owner of a entity named Vtrax, Inc. (Vtrax, Inc. was later reformed under the name Vtrax Sports, LLC - collectively referred to as "Vtrax" throughout). (Robbins Depo. at 67:7-13.)

Needing Cash, Robbins Convinces Cherokee & Walker to Make a Capital Contribution in a Joint Bicycle Venture

2. Cherokee & Walker ("C&W") had an initial meeting with Robbins on or about November 30, 1999 to discuss whether C&W would agree to invest capital in Vtrax. (Christensen Depo. at 93:23 - 94:8; 97:12-14.)

3. C&W ultimately agreed to make a capital investment of $500,000 for a 50 percent interest in Vtrax (and its related interest in Wasatch Cycles). C&W made at the same time a $4.5 million personal loan to Robbins. The investment and loan were effected on January 7, 2000. (*See* Membership Interest Purchase Agreement, attached as Exhibit 8; Term Promissory Note, attached as Exhibit 9; Receipt, attached as Exhibit 10; Registration Rights Agreement, attached

as Exhibit 11; Robbins Depo. at 109:21 - 110:25 and 111:5-25; Christensen Depo. at 37:21 - 38:7 and 115:22-25.)

4. At the time C&W made its investment in Vtrax it anticipated being quite involved in the management of Vtrax. (Christensen Depo. at 108:19 - 109:5.) Among other things, C&W anticipated bringing in operators, putting a board in place, obtaining regular reporting on both the business and financial aspects of the company, and expected to be involved in counseling and decision making. (*Id.*) Robbins represented to C&W he was agreeable to that level of involvement. (*Id.* at 109:6-8.)

5. As of January 7, 2000, Robbins and C&W were the only owners of Vtrax and Wasatch Cycles. (*Id.* at 120:25 - 121:8.)

Robbins Fails to Keep His End of the Bargain with Cherokee & Walker

6. Within weeks of making its investment ,C&W was having less than ideal communication flow with Robbins. (*Id.* at 126:2-12.) Robbins was making business decisions unilaterally, and without any input from C&W, "right out of the gate." (*Id.* at 127:16 - 128:1.) Through the first several months in business together, C&W was experiencing growing frustration with Robbins. (*Id.* at 136:1-16.)

7. C&W was never satisfied that it was receiving relevant information from Robbins, and as a result never felt it had a good grasp on the financial affairs of the company or the company's operations. (*Id.* at 137:7-15.) At some point Robbins prevented C&W from even having any direct contact with any Vtrax employees. (*Id.* at 152:9 - 153:17.) C&W became

quite concerned about the management team in place at Vtrax pretty early in its relationship with Robbins. (*Id.* at 139:19 - 140:1.)

Robbins Learns that Brunswick Corporation Plans to Auction its Bicycle Division

8. At around this same time Robbins learned that Brunswick Corporation ("Brunswick") intended to sell its bicycle division, including its Mongoose brand. (Robbins Depo. at 144:7-25.)

Robbins and Cherokee & Walker Agree to Terminate their Partnership

9. As a result of C&W's insistence that Robbins operate Vtrax in accordance with sound business principles, and the growing conflict between Robbins and C&W, Robbins approached C&W the first week in April 2000 asking C&W whether it would agree to sell its interest in Vtrax back to Robbins. (*See* Christensen letter dated July 1, 2000, attached as Exhibit 12.) Robbins and C&W mutually understood by early May 2000 that they were both interested in going different ways and that one or the other had to buy out the other's interest. (Christensen Depo. at 149:6-18.)

10. C&W and Robbins reached in the first week or two of May 2000 an agreement in principle about Robbins' repurchase of C&W's interest. (*Id.* at 162:8-11.) On May 17, 2000 Robbins sent C&W an e-mail with a proposed Redemption and Settlement Agreement, proposing that Robbins would make payment to C&W within 90 days. (*Id.* at 155:2-20; *see also* May 17, 2000 E-mail, attached as Exhibit 13.) In the e-mail Robbins reports he has been "working

extremely hard to try to find a way to bridge the money" and would "continue to figure out a way" to get C&W paid. (*Id.*)

Robbins is Unable to Meet His Payment Obligation to Cherokee & Walker

11. C&W initially agreed to a $10 million buyout of its interest in Vtrax and repayment of the personal loan it had made to Robbins. (*See* Christensen July 1 letter, Exhibit 12.) C&W was not, however, willing to wait 90 days for payment of the repurchase price due to concerns about the way Vtrax was being run. (*Id.*) As a result, Robbins agreed to obtain a $5 million loan by June 2, 2000, with payment of the remaining $5 million balance on or before January 8, 2001. (*Id.*) Robbins failed to make the promised $5 million payment on June 2, 2000. (*Id.*)

Robbins Renegotiates His Agreement with Cherokee & Walker

12. Robbins requested C&W agree to allow him three additional weeks to raise money for the $5 million payment on better terms. (*Id.*) Robbins also asked that C&W agree to a $2 million reduction in the proposed repurchase price, from $10 million to $8 million. (*Id.*) As a personal accommodation to Robbins, C&W agreed to a new payment date of June 30, 2000, and agreed to the reduced repurchase price. (*Id.*)

Robbins Strikes a New Deal with Cherokee & Walker, then Defaults a Second Time

13. On June 10, 2000 Robbins and C&W executed a Purchase and Settlement Agreement calling for Robbins to make payments totaling $8 million by June 30, 2000. (Purchase and Settlement Agreement attached as Exhibit 14.) Robbins made partial payment by

the end of June, but failed to make the payments required under the June 10 Agreement, leaving at least $5.8 million outstanding on the date payment in full was due. (Christensen July 1, 2000 letter, Exhibit 12.) This was at least the second time Robbins defaulted on payment obligations to C&W for the repurchase of its interest in Vtrax.

14. Late in the afternoon on June 29, 2000 Robbins called C&W to request an additional 45 days to make the remaining June 30 payment required under the June 10 Agreement. (*Id.*) C&W refused Robbins request and provided on July 1 a letter detailing C&W's concerns with Robbins' failures to make promised payments for the repurchase of C&W's interest in Vtrax, as well as C&W's concerns about the viability of Vtrax as a company given the way it was being managed. (*Id.*)

Robbins Misses Third Payment Deadline with Cherokee & Walker

15. By letter dated July 1, 2000 C&W provided Robbins a new July 6, 2000 deadline to pay C&W $3 million, with an additional $3.5 million due by August 15, 2000. (*Id.*) Alternatively, Robbins could choose to pay C&W $6 million by July 6, 2000. (*Id.*) If Robbins failed to make these payments, C&W explained they would exercise their rights under the initial January 7, 2000 agreements to take immediate possession of Vtrax and Wasatch Cycle, including all accounts receivable, inventory and proceeds. (*Id.*) In short, C&W explained they were "willing to take whatever steps [were] necessary to stop the bleeding and protect [their] investment." (*Id.*)

16. Robbins failed to make the required payment by July 6, 2000. (*See* July 12, 2000 E-mail, attached as Exhibit 15.) This was at least the third time Robbins had defaulted on required payments to C&W. (*Id.*) Based upon additional representations by Robbins about sources for repayment, C&W agreed on July 12 to a new payment deadline of July 14, 2000. (*Id.*)

Robbins Misses Fourth Payment Deadline with Cherokee and Walker

17. Robbins failed to make the promised July 14, 2000 payment. (*See* July 18, 2000 E-mail, attached as Exhibit 16.) This was at least the fourth time Robbins had defaulted on promised payments to C&W. Robbins represented to C&W that: 1) the loan to him from which he was going to make the promised payment to C&W had been finalized on July 13, 2000; 2) that there was a three day right of rescission that did not expire until July 17, 2000; 3) that Robbins had already delivered to his brother Danny on July 15, 2000 a check for the full amount outstanding and owing to C&W; and 4) that Danny would deliver the check to C&W no later than 5:00 p.m. on July 18, 2000. (*Id.*)

18. In response to Robbins' representations, C&W informed Robbins that if he failed to make the promised payment on July 18, it would physically appear at Vtrax first thing on the July 19, 2000 to "examine all financial records and to evaluate the current organizational structure, compensation and operational status of all the companies." (*Id.*)

Robbins Defaults for Fifth Time on Payment Obligation; Cherokee & Walker Retains Lawyers to Seize Control of the Bicycle Companies

19. Robbins failed to make the promised payment to C&W on July 18, 2000. (*See* July 23, 2000 E-mail, attached as Exhibit 17.) This was at least the fifth time Robbins failed to make payment to C&W when promised. As a result, C&W decided to turn the matter over to its attorneys to initiate legal proceedings to recover the money owed by Robbins. (*Id.*) In a July 23, 2000 e-mail to C&W, Robbins made new promises that he would be able to make payment in full to C&W. (*Id.*) Robbins acknowledged in the same e-mail that Vtrax was struggling. (*Id.*)

20. In an e-mail dated July 25, 2000, C&W expressed to Robbins its concern with the status of the company and the financial drain Robbins was placing on himself by virtue of hiring approximately 15 individuals in the preceding two-and-a-half months and incurring substantial expenses, including exorbitant salaries, while Vtrax had no revenues. (*See* July 25, 2000 E-mail, attached as Exhibit 18.) As a result, C&W informed Robbins it felt it had "limited options." (*Id.*)

21. Robbins met with C&W over lunch on July 25, 2000. (*See* July 26, 2000 E-mail, attached as Exhibit 19.) C&W informed Robbins the next day (July 26) that if several specific conditions were not satisfied by 5:00 the following day "the legal process will commence to seek protection of our investment." (*Id.*) C&W expressly told Robbins that it intended to proceed with a lawsuit if Robbins defaulted on the agreement to repurchase C&W's interest. (Christensen Depo. at 204:18 - 205: 4.)

22. Robbins responded in an e-mail the following day, July 27, 2000. (July 27, 2000 E-mail attached as Exhibit 20.) In the e-mail, Robbins represented that everything was in place to close with C&W and provide a cashier's check four days later. (*Id.*) Robbins also represented to C&W that he was "left with a company that's going to go under" and he was going to be "stuck with millions of dollars in debt." (*Id.*)

23. On July 28, 2000 attorney Jill Pohlman, with Stoel Rives in Salt Lake City, sent a letter to Robbins on behalf of C&W in which she informed Robbins that C&W intended to move against the collateral securing the promissory note Robbins provided C&W in exchange for their initial investment and loan. (*See* August 2, 2000 response from David Hardy, attached as Exhibit 21.) Robbins' attorney, David Hardy, responded with a letter dated August 2, 2000. (*Id.*)

Robbins is Introduced to Jenson as a Potential Source of Funding to Payoff Cherokee & Walker

24. Robbins and Jenson were introduced in July 2000 by Becky Mendenhall, a mutual acquaintance. (Robbins Depo. at 339:10-23; 341:3-9; Jenson Depo. at 43:16-25.) Robbins met with Jenson for the sole purpose of trying to obtain an $8 million loan from Jenson from which Robbins could pay C&W the money he owed and had repeatedly promised to pay. (Robbins Depo. at 344:6-9; 344:22 - 345:20.)

25. Robbins provided at the meeting with Jenson background about the bicycle companies, his deal with C&W, the Mongoose purchase he was pursuing, and his need to get C&W out. (Jenson Depo. at 45:2-11; Robbins Depo. at 344:10-21; 346:4-17; 347:11 - 348:7.)

During the course of a series of meetings between the two, Robbins told Jenson that C&W knew that Robbins was about to take over Mongoose and make "a lot of money," and if it took too long to get C&W paid, they were going to back out of their agreement to sell their interest in Vtrax back to Robbins so that they could participate in the Mongoose deal. (Jenson Depo. at 50:21 - 51:8.)

26. In connection with his efforts to persuade Jenson to make the loan, Robbins provided Jenson financial statements for the bicycle companies. (Jenson Depo. at 61:18-24.) Robbins also told Jenson he wanted C&W out so Robbins would own all of Mongoose, instead of just 50 percent. (Jenson Depo. at 67:19 - 68:6.)

Benjamin Lightner, Private Banker at Bank One for Robbins and Jenson, is Heavily Involved in Business Dealings with Robbins and Jenson, and is Kept Fully Informed of their Transactions

27. During the year 2000, Benjamin Lightner ("Lightner") was employed by Bank One as a wealth advisor in Bank One's private banking group. (Lightner Depo. at 10:8-13.)

28. In 2000 Lightner was Bank One's number one private banker in the nation in total sales. (Lightner Depo. at 179:1-21.)

29. Lightner was the private banker for both Robbins and Jenson. (Lightner Depo. at 111:03 - 115:07.) Lightner had frequent and regular communications with Robbins during 2000. (Lightner Depo. at 10:14-17.)

30. Lightner knew that Robbins and Jenson were partners who did business deals on a handshake. (Lightner Depo. at 199:24 - 200:3.)

31. Robbins was a personal friend of Lightner's and offered Lightner a job while Lightner was employed by Bank One. (Lightner Depo. at 320:1-7; 109:19 - 110:2.)

32. When Lightner left Bank One in late 2000 to take a job at Irwin Union Bank, he took Robbins and Jenson with him as clients. (Lightner Depo. at 83:24 - 84:1; 114:11-15; 115:14-17.)

33. Lightner characterized Bank One's relationship with Robbins in August 2000 as a growing relationship. (Lightner Depo. at 320:19-25.)

34. Lightner visited Robbins and the Vtrax offices very regularly, as often as daily or several times a week. (Larsen Depo. at 119:9 - 120:16.)

35. Robbins was in constant contact with Lightner and kept Lightner and Bank One fully informed about the status of Robbins' negotiations with Arimex, Unisource and the Mongoose bid efforts described below. (Robbins Depo. at 330:1-23.)

36. Lightner was personally involved in the efforts of Robbins and Jenson to acquire Mongoose. Among other things, as detailed below, he wrote letters at Robbins' request falsely representing the financial strength of Robbins and Jenson and their companies. Lightner also attended a meeting with Robbins and Arimex, a potential lender for the Mongoose deal. (Lightner Depo. at 35:17 - 36:6; 156:3-8.)

Lightner Makes Representations to Jenson on Behalf of Robbins

37. As part of his due diligence, Jenson had a couple conversations with Lightner, Robbins' private banker at Bank One. (*Id.* at 60:15 - 61:3; 63:16 - 66:2.) Lightner made

representations to Jenson on behalf of Robbins concerning the financial condition of Robbins and his companies. (*Id.* at 63:16 - 64:15.)

Jenson Approaches Bodell for $4 Million to Combine with $4 Million from Jenson to Make the $8 Million Loan Robbins Sought

38. Jenson then met with Michael Bodell in August 2000 to try to induce Bodell to lend $4 million to be coupled with an additional $4 million from Jenson to make an $8 million loan to Robbins. (Jenson Depo. at 102:7-16; Bodell Depo. at 45:9-24.) At the meeting Jenson explained to Bodell what Robbins had told Jenson, including that the $8 million was going to be used by Robbins to buy out C&W so Robbins could acquire Mongoose and obtain the entire benefit of that transaction for himself. (Jenson Depo. at 103:9 - 104:6; Bodell Depo. at 45:9 - 46:23.) Jenson also shared with Bodell the financial statements provided by Robbins showing the companies had worth of many millions of dollars. (Jenson Depo. at 103:9-18.) Jenson also relayed to Bodell what Lightner had told Jenson about Robbins and his companies. (Jenson Depo. at 105:12-21.)

39. Jenson first met Michael Bodell in May 1982 when they became neighbors. (Jenson Depo. at 92:2-10.) Jenson approached Mr. Bodell in June 2000 and secured a $1 million loan for use in Jenson's hard-money lending business. (*Id.* at 92:11 - 93:14; 94:6 - 95:19..) Mr. Bodell and Jenson had maintained since meeting in 1982 a friendly relationship. (*Id.* at 92:23 - 93:6.) Mr. Bodell liked Jenson. (*Id.*)

Jenson Commits to Lend $8 Million to Robbins Before Bodell Agrees to Make the $4 Million Loan to Jenson, Which Money Jenson Needed to Satisfy His Commitment to Robbins

40. After performing his due diligence, Jenson agreed to provide Robbins with an $8 million loan for the purpose of buying out C&W's interest in the bicycle companies. (*Id.* at 45:15-19.) To that end, Jenson provided Robbins a commitment letter dated August 9, 2000 calling for Jenson to make payment of $8 million to Robbins by August 15, 2000. (*See* August 9 Commitment Letter, attached as Exhibit 22.) The agreement with Robbins provided that Jenson would acquire a five percent interest in MadTrax Group upon funding. (*See* August 15, 2000 Loan Agreement, attached as Exhibit 23.)

41. It was Jenson's intention from the beginning that some of the money for the $8 million loan would come from Jenson and the rest would come from Bodell. (Jenson Depo. at 72:17 - 73:4.) While he was negotiating with Robbins, Jenson told Robbins about the sources of funding Jenson would use to make the $8 million loan to Robbins. (*Id.* at 72:7-11.) Jenson specifically told Robbins that some of the funds were coming in off another transaction, and Jenson identified Bodell as a source of some of the funds. (*Id.* at 72:7-16.) Jenson even told Robbins that Bodell would be contributing $4 million. (*Id.* at 73:5-9; 75:9-21.)

Based On Jenson's Commitment to Make an $8 Million Loan, Robbins Again Promises Payment In Full to Cherokee & Walker

42. The same day Jenson signed the commitment letter to Robbins agreeing to lend $8 million, Robbins exchanged e-mails with C&W disclosing the commitment letter from Jenson and falsely explaining that MadTrax Group was merely a holding company in which Robbins

intended to keep Vtrax and Wasatch Cycle. (*See* August 9, 2000 E-mails, attached as Exhibit 24.)

43. C&W subsequently had direct communications with Jenson and Lightner about Jenson's intention to perform under the August 9, 2000 commitment letter and Jenson's ability to do so. (Christensen Depo. at 214:8 - 216:7; 218:17 - 219:7.) Presumably based upon Lightner's knowledge that Jenson was receiving $4 million from Bodell, Lightner confirmed to C&W Jenson's ability to perform a transaction this size (i.e. $8 million loan to Robbins). (*Id.*)

44. On August 15, 2000, Robbins and C&W entered into a Settlement Agreement calling for Robbins to make payment to C&W that same day in an amount totaling $6,061,209.72. (August 15, 2000 Settlement Agreement attached as Exhibit 23.) Robbins failed to make that payment. (Christensen Depo. at 224:4 - 225:12.) This was at least the sixth time Robbins had defaulted on a payment obligation to C&W in connection with the repurchase of C&W's interest in the bicycle companies.

Having Already Committed Payment to Cherokee & Walker, Robbins is Desperate for the Money from Jenson and Commits to Helping Jenson Persuade Bodell to Loan $4 Million

45. In the meantime, Bodell was concerned about and struggling with the amount of money at issue in the proposed transaction and had not yet committed to lend $4 million to Jenson to give to Robbins. (Bodell Depo. at 53:21 - 54:8.) Bodell's primary concern was where the funds were coming from to repay the loan Jenson was asking Bodell to make. (*Id.* at 49:1 - 12.) At the same time, Robbins was asking Jenson about reasons for the delay funding the $8

million loan. (Jenson Depo. at 75:9-21.) Jenson testified he explained to Robbins it was taking longer to get the money from Bodell. (*Id.*)

Robbins Obtains a False Letter from Bank One to Convince Bodell to Make the $4 Million Loan to Jenson

46. With that knowledge, Robbins requested and received from Lightner at Bank One a letter dated August 22, 2000 addressed "To whom it may concern" (the "Lightner Letter"). (August 22, 2000 Lightner Letter attached as Exhibit 25; Robbins Depo. at 322:22 - 324:6.) That letter falsely represented that Jenson was a member of MadTrax Group, and falsely stated that $165 million was coming into a Bank One account to be managed by Robbins and Jenson. (*See* Lightner Letter, attached as Exhibit 25; Statement of Addt'l Material Facts, ¶¶ 47-59 below.)

47. The August 22, 2000 Lightner Letter from Bank One, on Bank One letterhead and bearing a fax header that reads "Bank One Broadway"provides:

> August 22, 2000
>
> To: Whom it may concern
>
> Re: MadTrax Group, LLC
>
> Gentlemen:
>
> MadTrax Group, LLC (the "Company") and its individual members Mark Robbins and Marc Jenson (the "Members") will be depositing $165,000,000 into Bank One, Utah NA. The funding is coming from a loan agreement between MadTrax Group, LLC, a Utah limited liability company and Arimex Investments, LTD., a Bahamian corporation. The sum of $165,000,000 will be deposited into an interest bearing account in the name of the Company and managed by its Members.

Should you have any questions with respect to this matter, please contact the Undersigned.

//s//
Ben Lightner
Wealth Advisor
Private Banking Group

(Lightner Letter, Exhibit 25.)

48. Robbins dictated for Lightner the information he wanted in the Lightner Letter. (Robbins Depo. at 446:5-20.) Lightner then drafted the letter. (*Id.*)

49. Bank One, through its Rule 30(b)(6) designee, and the author of the August 22, 2000 Lightner Letter concedes there was no verification by Bank One of the statements in the Letter. (Lightner Depo. at 240:10-19.)

The Lightner Letter is False

50. Bank One and Lightner did not know in August 2000 who the members of MadTrax Group were. (*Id.* at 240:20 - 241:3.) Jenson was not a member of MadTrax Group in August 2000, and that representation in the letter was false. (Jenson Depo. at 217:5-15.) The Lightner Letter confirms, however, that the Bank considered Robbins and Jenson partners and would reasonably expect that Jenson would received and use the Letter. (*See* Lightner Letter, attached as Exhibit 25.)

51. Bank One and Lightner concede they did not have in August 2000 proof that $165 million was going to be deposited into Bank One, Utah. (Lightner Depo. at 241:4-12.)

52. As evidenced by the August 22, 2000 letter and the other letters described below, Lightner was well aware that Jenson and Robbins were working together to raise funding for the deal, and Lightner remembers having discussions with Robbins about financing for it. (Lightner Depo. at 37:5-17.)

53. Bank One declined any financing for Robbins and his companies with respect to the Mongoose acquisition because Robbins did not have the necessary resources. (Lightner Depo. at 217:10 - 218:7.)

54. David Babcock, president of Vtrax and a member of the MadTrax team working on the Mongoose bid, testified that MadTrax had secured no lending arrangement with outside lenders as of August 23, 2000, the day after the letter was signed by Lightner and Bank One. (Babcock Depo. at 166:23 - 164:1.)

55. The $165 million loan agreement referenced in the Lightner Letter purportedly related to a draft loan agreement with Arimex. (Robbins Depo. at 329:16-22.) At no time was there a fully executed loan agreement between MadTrax and Arimex that guaranteed $165 million would be available for deposit into Bank One, as represented in the Lightner Letter. (Robbins Depo. at 331:16 - 332:1.) In fact, MadTrax did not and would not sign any agreement with Arimex unless MadTrax was selected as the winning bidder for Mongoose. (Robbins Depo. at 331:16 - 332:1.) Robbins discussed that fact with Lightner and Bank One. (*Id.*) MadTrax never had any agreement with Brunswick about what result MadTrax could expect in its bid for Mongoose – i.e., that it would be selected as the winning bidder. (Robbins Depo. at 210:3-6.)

56. Robbins was in constant contact with Lightner and kept Lightner and Bank One fully informed about the status of MadTrax's negotiations with Arimex, Unisource and the Mongoose bid efforts. (Robbins Depo. at 330:1-23.) To that end, Lightner visited Robbins and the Vtrax offices very regularly, as often as daily or several times a week. (Larsen Depo. at 119:9 - 120:16.)

57. Lightner was personally involved in the efforts of Robbins and Jenson to acquire Mongoose. Among other things, as detailed below, he wrote additional letters at Robbins' request falsely representing the financial strength of Robbins and Jenson and their companies. Lightner also attended a meeting with Robbins and Arimex, a potential lender for the Mongoose deal. (Lightner Depo. at 35:17 - 36:6; 156:3-8.)

58. Lightner and Bank One knew that MadTrax was merely bidding for Mongoose, and that its acquisition of Mongoose was never a done deal. (Robbins Depo. at 331:9-15.)

59. The Lightner Letter contains no qualification or disclaimer concerning any conditions precedent to the $165 million being deposited into Bank One to be managed by MadTrax Group. (*See* Lightner Letter, Exhibit 25.) Neither does the Lightner Letter indicate that the loan agreement between MadTrax and Arimex was contingent on some other event happening first, be it MadTrax winning its bid for Mongoose or any other event. (*Id.*) The Lightner Letter makes no disclosure that the Arimex loan was contingent on MadTrax Group first raising and depositing into an escrow account $16.5 million that MadTrax did not have. (*Id.*)

Lightner and Bank One Knew in August 2000 that Robbins was Working with Jenson to Raise Funds to Buyout Cherokee & Walker's Interest in their Joint Bicycle Venture

60. Before Bank One would make a loan to a client, it would gather financial and business information which would be sent to the National Credit Center where it would be analyzed. After that, Lightner had the option of signing off on the transaction. (Lightner Depo. at 274:1 - 275:2.)

61. If Bank One was going to do a loan for a client in 2000, Bank One did due diligence to find out about the borrower, including what their credit report looked like, how their cash flow looked, what the company did, and how the company operated. (Lightner Depo. at 144:18-24.)

62. During 2000, Robbins and his companies had loans with Bank One, including a $200,000 line of credit. (Lightner Depo. at 261:17 - 262:5.)

63. In the summer and fall of 2000, Bank One was "terming" Jenson out of some loans. Bank One required a rest period when the line of credit needed to be at zero and Jenson had not done that. (Lightner Depo. at 270:25 - 271:17.)

64. In connection with the loans made by Bank One to Robbins, Bank One received Robbins's personal financial statements and tax returns. (Lightner Depo. at 187:20-25.)

65. Lightner understood Robbins was associated with Vtrax, Madwagon, Wasatch Cycles and MadTrax Group and received personal financial statements and tax returns in connection with extending credit to Robbins. (Lightner Depo. at 186:9 - 187:7.)

66. In 2000, Bank One knew who owned Vtrax based upon the documentation received by the Bank in connection with extensions of credit. (Lightner Depo. at 196:22 - 197:4.)

67. Lightner understood that Cherokee & Walker owned part of at least one of Robbins' companies. (Lightner Depo. at 107:20 - 108:5.) In fact, Cherokee & Walker and Robbins co-guaranteed a Bank One loan to one of the companies. (*Id.* at 191:20 - 193:3.) Bank One would have known which of Robbins' companies Cherokee & Walker had an ownership interest in based upon the documentation received by Bank One. (*Id.* at 193:19-24.) Lightner had meetings with Cherokee & Walker and Robbins talking about what the company was doing. (*Id.* at 203:11-16.)

68. Lightner understood that Robbins was acquiring Cherokee & Walker's interest in the bicycle companies jointly owned with Robbins, and therefore wanted the loan at Bank One it had guaranteed closed out. (Lightner Depo. at 310:1-5.)

69. To that end, Lightner wrote a letter on Bank One letterhead to Jim Jenkins, a principal at Cherokee & Walker, dated July 3, 2000 in which he referred to "Shane" who was Shane Peery with Cherokee & Walker. (Lightner Depo. at 308:4-19; July 3, 2000 Lightner Letter attached as Exhibit 26.) The letter stated:

> Mr. Jim Jenkins
> Cherokee & Walker, LLC
> 1245 East Brickyard Rd. #350
> Salt Lake City, Utah 84106

Dear Mr. Jenkins:

The purpose of this brief letter is to confirm my verbal conversation with Shane that the following was occurred:

(1) All loan documents using the name of James W. Jenkins, Cherokee & Walker, LLC or Cherokee & Walker Investment Co., LLC (both signed and unsigned) relating to Vtrax Sports, LLC have been permanently destroyed.
(2) Cherokee & Walker, LLC, Cherokee & Walker Investment Co., LLC and/or James W. Jenkins are not currently co-signers/guarantors on any loan with Bank One in connection [sic] Vtrax Sports, LLC.

If I can be of any further assistance, please feel free to contact me at (801) 481-5020.

Sincerely,

//s//
Benjamin Lightner
Wealth Advisor

70. Lightner knew Robbins received money from Jenson in 2000, testified he did not know what Robbins did with the money, but stated that Robbins may have paid off Cherokee & Walker because Lightner knew that Robbins was purchasing Cherokee & Walker's interest in the companies they jointly owned. (Lightner Depo. at 259:16 - 260:11.) Lightner obtained that information either from Robbins or Cherokee & Walker. (Lightner Depo. at 260:12-16.)

71. Lightner even remembered taking checks to Cherokee & Walker at the direction of either Robbins or Jenson. (Lightner Depo. at 40:17 - 41:3.)

Robbins Defaults on Payment Obligations to Cherokee & Walker for the Seventh Time

72. The same day he requested and obtained the false Bank One letter from Lightner, Robbins sent an e-mail to C&W informing C&W that they could go to Bank One to obtain from

Lightner a cashier's check for the outstanding payment due C&W from Robbins. (August 22, 2000 E-mail attached as Exhibit 27.)

73. C&W went to Bank One the same day that Robbins obtained the August 22, 2000 Lightner Letter and waited for four hours for a check that never came. (Christensen Depo. at 87:8 - 91:6; 225:20 - 226:25.) This was at least the seventh time Robbins had promised payment to C&W on a specific day and failed to perform.

Robbins and Jenson Use the Lightner Letter to Persuade Bodell to Make the $4 Million Loan to Jenson, Which Loan Robbins and Jenson Needed to get $8 Million to Robbins to Buyout Cherokee & Walker

74. Robbins gave a copy of the false August 22, 2000 Lightner Letter to Jenson. (Jenson Depo. at 216:1-3.) Jenson told Robbins that he intended to show that Letter to Bodell. (*Id.* at 225:10 - 226:1.)

75. Jenson presented the false August 22, 2000 Lightner Letter to Bodell in connection with his efforts to induce Bodell to loan Jenson $4 million to be coupled with another $4 million from Jenson and made part of an $8 million loan to Robbins. (Jenson Depo. at 215:16-25.) Jenson told Bodell Bank One had provided the Lightner Letter to Robbins and Jenson to help them solicit funds by proving that $165 million was forthcoming, from which investors would be repaid. (Bodell Depo. at 60:13-22.) Jenson also told Bodell that his attorneys had already checked everything out. (Bodell Depo. at 52:9 - 53:4.)

The False August 22, 2000 Lightner Letter Accomplishes Robbins's Purpose

76. Relying primarily upon the representations in the Lightner Letter from Bank One confirming the funds going into the MadTrax account as a source of repayment, Bodell agreed to make the $4 million loan, but only if Jenson agreed to pay a higher interest rate than Jenson initially proposed. (*Id.* at 61:2 - 62:7; Jenson Depo. at 106:2-19.) Jenson got on the phone with Robbins and explained that Bodell was requiring one percent per week interest on the loan. (Jenson Depo. at 106:2-19.) Robbins told Jenson he would take care of the extra expense associated with the higher rate Bodell was insisting on. (*Id.*; *See also* Jenson Depo. at 323:19 - 324:3) Robbins knew going into the loan with Jenson that the term of Bodell's loan was only 30 days, with one percent per week interest, and likely to default into the penalty phase of the agreement. (Jenson Depo. at 139:11-25.)

77. On August 30, 2000, Bodell loaned $4 million to Jenson, the terms of the loan are memorialized in a Promissory Note and a Guaranty, both bearing the same date. (*See* Promissory Note, attached as Exhibit 28; and Guaranty, attached as Exhibit 29.)

78. The very next day, on August 31, 2000, Robbins paid C&W $1 million. (Copy of August 31, 2000 check attached as Exhibit 30.) On September 8, 2000, Robbins paid C&W another $1 million, with the remaining payment of $4,079,862.52 made on September 11, 2000. (Copy of checks attached as Exhibit 31.)

As Further Evidence that the Representations in the Lightner Letter Concerning an Arimex Loan were False, Robbins Continues to Seek Real Financing for the Mongoose Transaction

79. Notwithstanding the representations in the false August 22, 2000 Lightner Letter that the $165 million loan was coming from Arimex, MadTrax Group subsequently sought in September 2000 financing for a $165 million loan with a company called Unisource Cap. (Robbins Depo. at 287:16-25.) Even had MadTrax won its bid for Mongoose, Robbins and MadTrax had decided not to execute the loan agreement with Arimex, but had decided instead to pursue financing with Unisource Cap. (Robbins Depo. at 306:13-23.) There exists no executed loan agreement with Unisource Cap for $165 million, and Unisource Cap is not mentioned in the Lightner Letter. (*See* Lightner Letter, Exhibit 25.)

The CFO of Robbins's Bicycle Company Admits the Arimex Loan Arrangement was not Something MadTrax Wanted Anything to do With

80. Trevor Larsen ("Larsen") was during the relevant period the chief financial officer of Vtrax and spent a significant amount of time working on the MadTrax efforts to acquire Mongoose. (Larsen Depo. at 17:13-15; 117:16-25.) Larsen considered himself the "potential chief financial officer" for MadTrax Group and signed letters on MadTrax letterhead using that title. (*Id.* at 203:19 - 204:8.) Larsen was the principal contact at MadTrax with respect to the bid. (*Id.* at 177:7-10.) Among other things, Larsen made initial calls to Brunswick, obtained documents from Brunswick, attended meetings at Brunswick, attended meetings with potential lenders for the transaction and met with investment bankers. (*Id.* at 174:6-18.)

81. Larsen also met with Arimex concerning the Arimex proposal for financing. (Larsen Depo. at 188:14-25.) After hearing the Arimex sales pitch, it quickly became apparent that any lending arrangement with Arimex was not something MadTrax wanted to be involved with. (*Id.*) As Arimex was going through its sales pitch, Larsen just "shut down." (*Id.* at 192:18-24.)

MadTrax Group Had no Cash, was not Capitalized, Had no Assets, was Unable to Fill Purchase Orders, and Had no Inventory

82. David Babcock ("Babcock") was at all relevant times the president of Vtrax (Babcock Depo. at 22:4-12.) While he was president of Vtrax, Babcock observed that Vtrax had no recognized cash, was not capitalized, had no inventory, had no assets aside from computers, and was unable to fill purchase orders because it could not pay its manufacturer for the bicycles in advance of shipment. (Babcock Depo. at 74:12-20; 78:4 - 79:5; 85:24-25; 93:2-8; 109:17-20.) While Babcock was president, Vtrax never earned a profit and never generated any revenue. (*Id.* at 110:11-15.) Babcock is unaware of any assets ever held by MadTrax Group. (115:1-8.) Babcock never believed MadTrax could succeed in its efforts to acquire Mongoose. (*Id.* at 134:13 - 135:10.)

The President and CFO of Robbins's Bicycle Company Describe the Arimex Proposal as "Crazy" and Agree Arimex Can do Nothing for MadTrax

83. Babcock attended the meeting with Arimex and the meeting with Unisource Cap. (*Id.* at 81:22 - 82:10.) Babcock described the meeting with Arimex as "crazy." (*Id.* at 140:17-24.) Babcock didn't believe anything would come from the meeting. (*Id.* at 140:25 - 141:5.)

84. After meeting with Arimex, Larsen and Babcock had a discussion about the fact that Arimex was not a company that could do anything for MadTrax Group. (*Id.* at 189:14-22.) The proposed Arimex transaction was premised on MadTrax first giving money to Arimex, before Arimex would lend money to MadTrax, and the arrangement "just didn't sound right." (*Id.* at 189:16 - 190:8.)

The Arimex Loan Agreement Included Conditions Precedent to Funding that MadTrax Did Not and Could Not Satisfy

85. Robbins attaches as Exhibit 34 to his moving papers what he claims is a copy of the final form of agreement between MadTrax and Arimex for a $165 million loan. As noted above, there exists no foundation whatsoever for this document and it must not be considered in support of Robbins' motion for summary judgment. By its own terms, however, the document required in advance of any loan to MadTrax that MadTrax establish an escrow account with a financial institution and deposit into the escrow account $16.5 million. (*See* Arimex Agreement, attached as Exhibit 1, at ¶ 1.6; Arimex Escrow Agreement with Bank One and MadTrax, attached as Exhibit 2.) The agreement further required in advance of any loan from Arimex that MadTrax Group obtain an executed "Proof of Funds" letter from an "FDICA regional bank" in a specific form provided by Arimex. (*Id.* at ¶ 1.7.)

86. Neither MadTrax nor Robbins had $16.5 million on hand to fund the required escrow account prior to receiving the Arimex money, and Robbins knew MadTrax was going to

have to raise that money to get the loan. (Robbins Depo. at 266:23 - 269:16.) Larsen testified that number was "just too big" for MadTrax. (Larsen Depo. at 223:13-21.)

87. MadTrax was incapable of making the required pre-payment. MadTrax sought financing from Arimex and Unisource Cap because it had no assets of its own. (Robbins Depo. at 204:16-20.) MadTrax never had any assets, never had any bank accounts, was never capitalized and never had any cash flow. (Larsen Depo. at 126:15 - 127:7.)

88. There exists in this case no evidence that a "proof of funds letter" was ever executed by a regional bank, as required by the express terms of the Arimex loan agreement before Arimex would fund the loan.

The CFO of Robbins's Bicycle Company Discusses with Robbins that Arimex was Not a Legitimate Opportunity for MadTrax

89. Following the Arimex meeting, Larsen had conversations with Robbins in which Larsen said he didn't think the Arimex deal was "real," or a "legitimate opportunity to fund Mongoose or any other deal." (Larsen Depo. at 190:22 - 191:2.) Larsen never received additional information he requested from Arimex as part of his due diligence, including a list of other companies with which Arimex had entered into similar lending arrangements. (*Id.* at 191:18 - 192:7.)

90. In Larsen's opinion, the only thing that came from the meetings and discussions with Arimex was "just a lot of wasted time." (*Id.* at 192:25 - 193:3.) Larsen never saw any finalized or executed loan agreements with Arimex. (*Id.* at 193:4-8.) As far as Babcock is

aware, there was never any follow-up with Arimex after the meeting. (Babcock Depo. at 141:6-10.) Babcock is aware of no commitments for lending from Arimex as a result of the meeting. (*Id.* at 141:11-14.) Babcock never saw any loan agreements of contracts between MadTrax Group and Arimex. (*Id.* at 171:1-4.)

The Purported Funding Agreement with Unisource Cap was "Three Times as Crazy" as the Unrealistic Arimex Transaction

91. Larsen was also present for the September 2000 MadTrax meeting with the principal of Unisource Cap. (Larsen Depo. at 193:17-22.) Larsen described the Unisource Cap discussions as "three times the – as crazy as the Arimex deal." (*Id.* at 193:23 - 194:1.) Larsen described the proposed Unisource transaction as "just a joke." (*Id.* at 194:2-11.) Babcock was also present for that meeting and is aware of no follow-up ever taking place with Unisource. (Babcock Depo. at 142:17-24.) Babcock is aware of no lending commitment resulting from the MadTrax Group meeting with Unisource Cap. (*Id.* at 142:25 - 143:3.)

Robbins and MadTrax Never Disclosed to their Own Investment Bankers the Purportedly Finalized Lending Agreements with Arimex and Unisource Cap

92. Prior to retaining the investment banking firm of Duff & Phelps in November 2000 to assist with the Mongoose bid, MadTrax had no source of funding in place for the purchase of the Brunswick bicycle division. (Larsen Depo. at 195:8-12; *See also* Duff & Phelps November 7, 2000 retainer letter, attached as Exhibit 32.)

93. Duff & Phelps worked as MadTrax's agent to obtain financing for the proposed Mongoose acquisition, including obtaining in November 2000 a term sheet for $75 million from

GE Capital Commercial Finance ("GE Capital"). (*See* GE Capital November 7, 2000 letter, attached as Exhibit 3, and term sheet, attached as Exhibit 33.)

94. Susan Wilson ("Wilson") was a managing director at Duff & Phelps on the team that assisted MadTrax in November 2000 with its efforts to acquire Mongoose. (Wilson Depo. at 9:3-15.) One aspect of Wilson's engagement with MadTrax was to provide assistance in obtaining financing for the Mongoose acquisition. (*Id.* at 48:3-6.) Wilson never saw the Lightner Letter in connection with Duff & Phelps' representation of MadTrax Group. (*Id.* at 42:22 - 43:4.)

95. The reference in the Lightner Letter to a loan for $165 million was much higher than any numbers Wilson discussed with MadTrax Group in November 2000 for the acquisition of Mongoose. (*Id.* at 45:13-21.) Despite Duff & Phelps having discussions with MadTrax Group about its access to capital for the Mongoose acquisition, and notwithstanding that obtaining financing for the acquisition was one of the main components of Duff & Phelps' work for MadTrax, neither Robbins nor anyone else at MadTrax told Wilson about having access to $165 million in financing. (*Id.* at 46:5-18.)

96. Wilson did not have any conversations with Robbins or anyone else at MadTrax Group in which she was informed that Robbins or MadTrax Group had access to cash, bonds or other marketable securities valued in excess of $971 million, as represented in a separate letter Robbins requested and obtained from Lightner and Bank One to give to Lincoln Partners as

evidence of MadTrax's ability to fund the proposed acquisition of Mongoose. (*Id.* at 46:19 - 47:11; *See also* ¶¶ 113-121 below.)

97. Had MadTrax indeed obtained a loan from Arimex for the Mongoose acquisition before November 2000, that fact likely would have precluded MadTrax Group from obtaining the GE Capital loan Duff & Phelps was pursuing as MadTrax's agent to fund the proposed purchase. (*Id.* at 49:10 - 50:4.)

The False August 22, 2000 Lightner Letter Was Never Intended for Lincoln Partners

98. The August 22, 2000 Lightner Letter is addressed "To whom it may concern." (*See* Lightner Letter, Exhibit 25.) It is not addressed to Lincoln Partners. (*Id.*)

99. Lincoln Partners was the investment banker retained by Brunswick to provide advice with respect to the sale of Brunswick's bicycle division, to perform due diligence and to screen potential bidders to determine whether they had the financial means to consummate the purchase of Mongoose. (Brown Depo. at 11:10 - 12:4.)

100. Robbins' ability to finance the acquisition of Mongoose was of paramount importance to Lincoln Partners. (Houser Depo. at 18:20 - 19:5.) Lincoln Partners spent a lot of time talking with Robbins about where the money was coming from for his proposed purchase of Mongoose. (Houser Depo. at 12:20 - 13:3.)

101. Robbins' ability to finance the purchase of Mongoose was a sensitive issue for Robbins. (*Id.* at 18:11 - 19:5.) Robbins was reluctant to provide the information Lincoln Partners requested about his ability to finance the purchase. (*Id.* at 19:6-7.) Robbins eventually

put Lincoln Partners in touch with Lightner at Bank One, and they had conversations with Lightner about Robbins' ability to fund the proposed acquisition of Mongoose. (*Id.* at 16:5 - 17:1.)

102. David Houser ("Houser"), a senior vice president at Lincoln Partners, worked on the Brunswick bicycle sale in 2000, including MadTrax's bid. (Houser Depo. at 7:18-21; 10:8-21.) Houser has no recollection of any discussions with Robbins or MadTrax Group about $165 million being loaned or deposited into Bank One for the transaction. (*Id.* at 52:16-18.) Despite being pressed by Lincoln Partners to be specific about the source of MadTrax's funding for the proposed acquisition, Robbins made no representations about where the money was coming from. (*Id.* at 55:24 - 56:23.) Specifically, Robbins never made any representations about having funds available from a company called Arimex Investments or Unisource Cap. (*Id.* at 56:24 - 57:6; Brown Depo. at 66:6-15; 80:9-21.)

103. Neither Brown nor Houser at Lincoln Partners has any memory of ever seeing the August 22, 2000 Lightner Letter prior to their depositions in this case. (Brown Depo. at 73:6-12; Houser Depo. at 51:23 - 52:18.)

104. Larsen, the MadTrax point of contact for Lincoln Partners had not seen the Lightner Letter prior to his deposition in this case. (Larsen Depo. at 234:9 - 235:15.)

Lightner and Bank One Published Several Other False Letters to Assist Robbins with His Business Transactions

105. In addition to the fraudulent and false August 22, 2000 Letter (*see* Paragraphs 46-79 above), Lightner and Bank One authored for Robbins at least three other letters on Bank One letterhead in which Lightner and Bank One made statements Lightner admits were false at the time the letters were written. (*See* July 27, 2000 Bank One letter to James Schenk at Brunswick Corporation, attached as Exhibit 34; October 19, 2000 Bank One letter to Rob Brown at Lincoln Partners, attached as Exhibit 35; and October 19, 2000 Bank One letter addressed to the Union Bank of Switzerland, attached as Exhibit 36.) Lightner also created a false Form Verification of Deposit for Robbins falsely stating the value of Robbins' accounts at Bank One. (*See* Form Verification of Deposit, attached as Exhibit 37.) Lightner neither confirms nor denies that he wrote any of the letters, but as detailed below, the sworn testimony of third-party witnesses independently ties Lightner to the letters. (*See* Statement of Addt'l Material Facts, ¶¶ 106-123.)

106. The first of the false Bank One letters authored by Lightner is a letter dated July 27, 2000. (*See* July 27, 2000 Lightner Letter to Brunswick, attached as Exhibit 34.) Robbins or Larsen requested and obtained this letter from Lightner at Bank One. (Robbins Depo. at 214:23 - 215:1.) This letter was attached to another letter to Brunswick the same day from MadTrax Group. (Robbins Depo. at 214:7-22.)

107. The July 27, 2000 Lightner Letter to Brunswick reads:

July 27, 2000

James Schenk
Vice President
Brunswick Corporation

Dear Mr. Schenk:

MadTrax Group, LLC (the Company) and several members of management have been long-time customers with Bank One, Utah, NA (Bank One). Over the years, Bank One and the Company have partnered together to complete several successful business transactions.

Based on our discussions with management of the Company, we confirm that the Company has the financial resources to complete the acquisition of the bicycle segment of Brunswick Corporation. Bank One is interested in the potential opportunity to finance the purchase of certain acquired assets. The management of the Company has established several significant lies of credit with Bank One.

Please call me at (801) 481-5020 if you have any questions.

Sincerely,
//s//
Benjamin M. Lightner
Bank One, Utah, NA
Relationship Manager[1]

108. The letter contains several misrepresentations. Robbins, Lightner and Bank One all concede that Madtrax Group and the members of management had not been longtime customers of Bank One in July 2000. (Lightner Depo. at 219:20 - 220:8; Robbins Depo. at 216:22 - 217:8.) Bank One does not believe MadTrax Group had even been formed at that time.

[1] Lightner does not deny writing the letter, but testified that he did not know if he wrote the letter or not. (Lightner Depo. at 224:4-15.)

(Lightner Depo. at 221:22 - 222:2.) Bank One had not had a relationship with MadTrax or its management for years, as represented in the letter. (Lightner Depo. at 220:21 - 221:11) Bank One did not even know who the managers of MadTrax Group were. (Lightner Depo. at 220:21 - 221·11.) It was not true in July 2000 that Bank One and MadTrax Group had partnered together to complete several successful business transactions. (Lightner Depo. at 222:8-12; Robbins Depo. at 217:16-24.) Moreover, Bank One did not have an interest in financing the purchase of assets, as Bank One declined Robbins and Jenson every time they brought proposed business transactions because they did not have the "wherewithal." (Lightner Depo. at 222.8-12.) In fact, Bank One knew in July 2000 that MadTrax did not have the financial resources to complete the acquisition of Mongoose. (Lightner Depo. at 222:3-7; 222:13-20.)

109. At Robbins' request, Lightner and Bank One next authored the August 22, 2000 Lightner Letter. (*See* Bank One August 22, 2000 Lightner Letter, attached as Exhibit 25.) As noted above, the August 22, 2000 Lightner Letter contains numerous representations that Lightner and Bank One knew to be false at the time the letter was written. (*See* Statement of Addt'l Material Facts, ¶¶ 46-79.)[2]

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[2] Lightner does not deny that he wrote the August 22, 2000 letter, but testified that because the letter was false he did not think he wrote the letter, even though it was faxed from Bank One's Broadway branch where he worked (Lightner Depo at 238 19 - 241 12) Chase has previously acknowledged that whether Lightner wrote the letter presents a question of fact that must be resolved at trial Overwhelming evidence will establish that Lightner did in fact write the letter, including the testimony of Defendant Robbins that he requested and received the letter from Lightner, and the testimony of disinterested third-parties that they discussed with Lightner the other letters described herein containing similar (and in some instances, identical) misrepresentations

Bank One Admits a Letter Addressed "To Whom it May Concern" Should Not be Written Because the Bank Cannot Control Who May Rely on it

110. The August 22, 2000 Lightner Letter is addressed "To whom it may concern." (*See* Bank One August 22, 2000 Lightner Letter, attached as Exhibit 25.) Lightner understood that an employee of Bank One should not address a letter "To whom it may concern" because you are uncertain who might read it and rely on it. (Lightner Depo. at 255:24 - 256:4.)

111. Bank One acknowledges that writing a letter addressed "To whom it may concern" is inappropriate and a violation of standard practice in the banking industry. (Mayo Depo. (as Bank One corporate designee), at 95:16 - 96:7.) Chase concedes "you don't generate 'to whom it may concern' letters at all in standard practice." (*Id.* at 104:2-4.)

112. Chase acknowledges that such a letter is against standard practice in the industry because there exists a risk that any person could claim to be "to whom it may concern." (*Id.* at 98:11 - 100:13.)

113. At Robbins' request, Lightner and Bank One next prepared and sent to Lincoln Partners a letter dated October 19, 2000. (Robbins Depo. at 232:18 - 233:9.)

114. The October 19, 2000 letter (attached as Exhibit 35) is addressed to Rob Brown, Vice President, Lincoln Partners LLC, and reads as follows:

> Rob Brown
> Vice President
> Lincoln Partners
> 181 West Madison Street, Suite 3750
> Chicago, Illinois 60602

Dear Mr. Brown:

MadTrax Group, LLC (the "Company") and its individual members collectively have on deposit with several financial institutions, including cash, government bonds and marketable securities valued in excess of $971,716,000, of which $165,000,000 will be deposited into Bank One, Utah, NA (Bank One) by December 1, 2000. Bank One has received copies of all personal financials, tax returns, marketable securities, government bonds, and pertinent documents to conclude and verify the value of MadTrax Group, LLC and its individual members.

Based upon our recent discussions, and additional financial information provided by the management of the Company, we confirm that the Company has the financial resources in place to complete the acquisition of Brunswick Bicycles, with a purchase price of $63,000,000.

Should you have any questions with respect to this matter, please contact the undersigned.

//s//
Benjamin M. Lightner
Bank One, Utah, NA
Wealth Advisor[3]

115. Robbins' purpose in obtaining this letter from Bank One was to show Lincoln Partners that MadTrax had the ability to fund the proposed acquisition. (Robbins Depo. at 233:4-9.) Robert Brown ("Brown"), a vice president at Lincoln Partners working on the Brunswick bicycle sale had a conversation with Lightner at Bank One in which Brown requested Lightner send something to Brown verifying Robbins' and MadTrax's ability to finance the proposed acquisition. (Brown Depo. at 55:23 - 56:3.)

[3] Again, Lightner did not deny he wrote this letter, but because the content of the letter was false he says he would not have written the letter. (Lightner Depo. at 226:5-14.)

116. Robert Brown with Lincoln Partners spoke with Lightner who confirmed he had written the letter, that the information contained in the letter was true and that MadTrax had the ability to finance the purchase of Mongoose. (Brown Depo. at 81:12 - 82:11; 55:22 - 56:8.)

117. David Houser with Lincoln Partners testified that Lightner confirmed in telephone conversations the financial wherewithal of Robbins and his companies to do the transaction. (Houser Depo. at 15:11 - 18:9.)

118. In fact, the information contained in the October 19, 2000 letter was false, as Lightner admitted. (Lightner Depo. at 225:20 - 229:25.) For example, Bank One and Lightner concede it was not true in October 2000 that MadTrax Group and its individual members had on deposit with several financial institutions cash, government bonds, and marketable securities valued in excess of $971 million. (Lightner Depo. at 229:2-10.) Lightner and Bank One knew that was a false statement in October 2000. (*Id.* at 229:12-14.)

119. Bank One and Lightner further concede it was not true in October 2000 that Bank One was expecting $165 million to be deposited by December 1, 2000. (*Id.* at 229:15-20.) Nor was it true in October 2000 that Bank One had received copies of personal financial statements, tax returns, marketable securities, government bonds or other documents to conclude and verify the value of MadTrax Group and its individual members. (*Id.* at 230:5-21.) Lightner and Bank One knew that was a false statement at the time the letter was written. (*Id.* at 230:22-24.)

120. MadTrax Group and its agents prepared and sent between July and November 2000 no fewer than ten separate pieces of correspondence to Brunswick and Lincoln Partners.

(*See* letters, attached as Exhibits 34-35 and 38-45.) None of them are addressed "To whom it may concern." (*Id.*)

121. As part of its file relating to the Brunswick transaction, Lincoln Partners kept correspondence provided to it by MadTrax relating to potential financing sources. (Brown Depo. at 28:4-15.) The August 22, 2000 Lightner Letter is not in the files of Lincoln Partners and was not produced by Lincoln Partners in response to a subpoena in this case. (*Id.* at 76:3-7.) The October 19, 2000 letter was in their files and was produced in response to a subpoena in this case.

122. The fourth Bank One letter authored by Lightner on Bank One letterhead is a letter dated October 19, 2000, directed to the Union Bank of Switzerland and addressed to "Ladies and Gentlemen." (*See* Bank One October 19, 2000 UBS letter, attached as Exhibit 36.) Lightner's letter to UBS stated:

Union Bank of Switzerland
Bahnhofstrasse 45
Zurich, 8001
Switzerland
41-1-234-1111

Re: MadTrax Group, LLC

Ladies and Gentlemen:

MadTrax Group, LLC (the "Company") and its individual members collectively have on deposit with several financial institution [sic] including case, government bonds and marketable securities valued in excess of $971,716,000, of which $165,000,000 will be deposited into Bank One, Utah, NA (Bank One) by December 1, 2000. Bank One has received copies of all personal

financials, tax returns, marketable securities, government bonds, and pertinent documents to conclude and verify the value of MadTrax Group, LLC and its individual members.

Upon the execution of the Agreement between the Company and the Union Bank of Switzerland, Bank One will establish a $100,000,000 ("Custodial Account") in accordance with the provisions of the Agreement and the usage of the Companies funds to activate the account.

Should you have any questions with respect to this matter, please contact the undersigned.

//s//
Benjamin M. Lightner
Bank One, Utah, NA
Wealth Advisor
(801) 481-5020

123. Michael Peterson, at the time a Vice President with Merrill Lynch, spoke with Lightner in a telephone conversation within a day or so of the date of the letter, in which Lightner confirmed he had written the UBS letter and vouched for the accuracy of the representations in it. (Peterson Depo. at 38:1 - 39:4; 34:25 - 38:4; and 24:12 - 25:19.)

124. Bank One did not do any due diligence with respect to the August 22, 2000 Lightner Letter or any of the other letters authored by Lightner. (Lightner Depo. at 250:18-23.)

125. Lightner and Bank One understood that consumers and businesses have an expectation that if banks make representations in letter the banks will first do their due diligence to make sure the representations are correct and that if a bank makes a representation in correspondence that a transaction will occur, the bank is obligated to do due diligence to ensure the representation is true and accurate. (Lightner Depo. at 25 - 26:14; and 30:8-13.)

IV. ARGUMENT[4]

Bodell asserts against Bank One claims for fraud and negligent misrepresentation. Fraud generally consists of: 1) a representation by the defendant; 2) concerning a presently existing material fact; 3) which representation was false; 4) which the defendant either knew to be false or made recklessly, knowing that there was insufficient knowledge on which to base the representation; 5) for the purpose of inducing another to act; and that 6) the other party acts reasonably thereon in ignorance of the falsity of the representation and to its detriment. *See Robinson v. Tripco Investment, Inc* , 21 P.3d 219 (Utah Ct. App. 2000.)

Negligent misrepresentation generally consists of: 1) a defendant with a pecuniary interest in a transaction; 2) who is in a superior position to know material facts about that transaction; 3) who carelessly or negligently makes a false representation concerning those facts; 4) expecting another to rely and act on that representation; 5) a plaintiff who does rely on the representation; and 6) suffers harm as a result. *See Jardine v. Brunswick Corp.*, 423 P.2d 659 (Utah 1967).

Bank One variously moves for summary judgment on fraud and negligent misrepresentation claims on the bases that: 1) there was no representation by Lightner and Bank One concerning a presently existing fact; 2) the representations made by Lightner and the Bank in the August 22, 2000 letter were not false; 3) Bodell's reliance on the August 22, 2000 Bank

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[4] As Bank One notes in its moving papers, the Scheduling Order and Order on Motions filed May 29, 2007, provided for overlength briefing on summary judgment where a Defendant consolidated into a single motion several discrete bases for summary judgment Like Bank One, Bodell's consolidated memorandum in opposition is substantially shorter than authorized by the Court

One letter was not reasonable as a matter of law; and 4) notwithstanding the fact that it previously moved unsuccessfully for summary judgment on the issue, Bank One argues Bodell's pre-lawsuit settlement with Jenson amounted to an accord and satisfaction operating to Bank One's benefit.[5]

In reverse order, Judge Bohling previously considered and correctly rejected Bank One's specious argument that Bodell's pre-lawsuit settlement with Jenson precludes Bodell's claims against Bank One. Judge Bohling's ruling is the law of the case and should not be disturbed. Bodell's reliance on the Bank One letter was plainly reasonable under the circumstances, but Utah courts have consistently held that the reasonableness of one's reliance is a question of fact for juries to resolve after hearing all the facts surrounding the specific transaction at issue in each case. Moreover, the Bank One letter upon which Bodell relied was false and Bank One itself concedes it had no basis for the outrageous and false claims it made in the letter. Finally, the Bank One letter quite clearly makes misrepresentations concerning then-existing facts, as is evident on the face of the letter. Bank One's motion fails in its entirety.

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[5] As noted below, Bank One filed a motion for summary judgment on this issue. The issue was fully briefed and argued Judge Bohling denied Bank One's motion Judge Bohling's ruling is the law of the case Bank One does not even argue that new facts or new law make the issue ripe for reconsideration Bank One's inclusion of this issue is nothing more than an attempt to get a second bite at the apple in hopes that the Court will reconsider and overrule Judge Bohling's previous ruling

A. THE MISREPRESENTATION CONTAINED IN THE AUGUST 22 LIGHTNER LETTER IS ACTIONABLE.

Bank One erroneously argues that Lightner's representation in his August 22 letter that $165 million "will be" deposited into Bank One "coming from a loan agreement between Madtrax Group, LLC . . . and Arimex Investments, LLC" is not actionable because it does not relate to a presently existing fact but, instead, relates to a "possible future event." (Bank One Memo. at 2.) This argument cannot withstand analysis. In the first place, the Bank's representation was not a prophecy or hope, it was made as a statement of facts, which would inform a reasonable person that the requisite due diligence was already performed to confirm those facts. Here it is simple - the Bank not only admits the representations wer false, but admits that it had no basis to make the representation.

Fraud consists of an affirmative misrepresentation or of an omission to disclose material facts necessary to make the representation made not misleading. *Taylor v. Gasor, Inc.*, 607 P.2d 293, 294 (Utah 1980); *Elder v. Clawson*, 384 P.2d 802, 804-805 (Utah 1963). A plaintiff must prove that a representation was false or was made when the representor knew he had insufficient information upon which to base the representation. *Alta Health Strategies, Inc. v. Kennedy*, 790 F.Supp. 1085, 1094 (D. Utah 1992). Lightner admitted in his deposition, the August 22, 2000 letter was false and there was no reasonable basis for the representations made therein. (SOF ¶¶ 46-79.)

In *John Hancock Mut. Life Ins. Co. v. Weisman*, 27 F.3d 500, 504 (10th Cir. 1995), the Tenth Circuit recognized that "an opinion or prediction can be a misrepresentation to the extent that it is a misstatement of the facts underlying it." *Accord, Register v. Roberson Constr. Co., Inc.*, 741 P.2d 1364, 1367 (N.M. 1987). And, in *Herald Tyner Development Builders, Inc. v. First Mark Development Corp.*, 429 S.E.2d 819, 821-822 (S.C. App. 1993), the court upheld a fraud verdict where the defendant falsely assured the plaintiff that it intended to perform a contract by completing the purchase of the subject property but failed to disclose that its decision to follow through on its contract depended at least in part on whether a third party performed its agreement to purchase lots from defendant.

A reasonable jury could easily find that the August 22 Lightner Letter strongly implies that the Bank had performed its due diligence to confirm the facts presented in the letter; that a fully executed loan agreement existed between Madtrax (which had not even been formed and never was formed) and Arimex for Arimex to loan $165 million to Madtrax; that there were no unfulfilled conditions to funding of the loan; and that the making of the loan was imminent. The letter fails to disclose that the nonexistent Madtrax had not signed the Arimex loan agreement; that neither Madtrax nor BankOne had done any due diligence to determine whether Arimex had the capability of funding a $165 million loan; that even if Arimex had the ability to fund the loan, Madtrax would only sign the loan agreement and obtain the loan in the highly unlikely event that Madtrax was the successful bidder for Mongoose; that Robbins and Lightner had made outrageous misrepresentations to Lincoln Partners and Brunswick concerning the bicycle

companies to even be allowed in the bidding process; that even if Arimex had the ability to fund the loan, Arimex would only fund the loan if Madtrax first deposited $16.5 million in an escrow account to insure payment of interest to Arimex under the loan agreement; that Madtrax had no ability whatsoever to pay that $16.5 million into escrow; and that MadTrax had in any event decided not seek funding from Arimex, but instead intended to pursue funding from Unisource Cap. (*See* August 22, 2000 Lightner Letter, attached as Exhibit 25; SOF ¶¶ 50-66, 79, 82 and 85-88.)

Indeed, Vtrax's President, David Babcock, testified that by July and early August of 2000, because of a lack of funds, Vtrax could not even fill the one bicycle order it ever received, that Vtrax never sold one bicycle and had no inventory, that he thought it was "crazy" to be talking to "strangers from Mexico" (Arimex) about investments and that he did not worry about financing the Mongoose transaction because he "didn't think we would ever get that bid." (Babcock Depo. at pp. 103-104; 109-110; 115; 76-77; 85; 92-93; 140-141; 134-135.)

Most importantly, a jury would be compelled to find that the letter met the factual criteria to impose liability on the sworn testimony of its author that it was false and that there was no reasonable basis for the representation.

The cases relied upon by Bank One are easily distinguished because none of them involved a situation like the case at bar where the person making the representation knew there was no basis for the representation. For example, in *Cerritos Trucking Co. v. Utah Venture No. 1*, 645 P.2d 608 (Utah 1982), the Supreme Court merely held that the defendant's good faith

representation that it intended to enter into a future transaction was not actionable. Similarly, in *Jardine v. Brunswick Corp.*, 423 P.2d 659 (Utah 1967), the Supreme Court held that the representation was not actionable because it only reflected an opinion concerning the defendant's future ability to build and finance a commercial building.

In short, it is a factual issue for the jury to decide whether at the time Lightner wrote his August 22 letter he knew he had insufficient information upon which to base his assurance that $165 million would be deposited into Bank One from a loan agreement with Arimex or whether Lightner deliberately omitted facts necessary to make his representations not misleading.

B. IT IS FOR THE JURY TO DECIDE WHETHER THE REPRESENTATION MADE IN THE AUGUST 22 LIGHTNER LETTER WAS FALSE WHEN MADE.

Bank One tries to argue around its own officer's sworn testimony (as Bank One's Rule 30(b)(6) designee) that the letter was false and that there was no reasonable basis for the representations in the letter. To that end, Bank One makes the astonishing argument that there is no evidence that the representation made in the Lightner letter was false when made because "all that stood in the way of Madtrax receiving its $165 million from Arimex was the signature of Mark Robbins on the Arimex loan agreement." (Bank One Memo. at 5.) Bank One cannot get around the fact that Lightner admitted in his deposition that the letter was false. (SOF ¶¶ 46-79.)

For all the reasons explained in Section A above, there was no basis for Lightner's statement in his letter that $165 million "will be deposited" by the non-existent Madtrax and its members, Robbins and Jenson, into Bank One. All Robbins had as of August 22, 2000, was a

hope and a prayer that he would be able to purchase Mongoose and fund that purchase through a loan from Arimex by egregiously misrepresenting his and the bicycle company's financial strength and resources. There is no evidence that Arimex had the ability to fund the loan. In addition, the evidence is indisputable that Robbins and the bicycle companies had no ability whatsoever to deposit $16.5 million into escrow which was a condition precedent to the making of the loan by Arimex. (SOF ¶¶ 80-90.) Neither had MadTrax secured a proof of funds letter from a national bank confirming MadTrax's ability to fund the $16.5 million into escrow - also a condition precedent to obtaining the Arimex loan. (SOF 80-90.) Genuine issues of material fact clearly exist with respect to the truthfulness of Lightner's August 22 letter, which must be decided by the jury at trial.

C. WHETHER BODELL REASONABLY RELIED ON LIGHTNER'S AUGUST 22 LETTER IS A QUESTION OF FACT FOR THE JURY TO DECIDE.

Bank One next attempts to convert the quintessential fact issue of reasonable reliance into a legal question by arguing that as a matter of law Bodell could not have reasonably relied upon the representations contained in Lightner's August 22 letter without further investigation. This argument is without merit and ignores both highly relevant evidence in this case and established case law in Utah that a party generally may reasonably rely on affirmative representations of fact without independent investigation.

Utah courts have emphasized time and again that whether a plaintiff reasonably relied upon a misrepresentation is generally a question of fact to be determined by the jury. *See, e.g.,*

Condor v. A. L. Williams & Assocs., Inc., 739 P.2d 634, 638 (Utah App. 1987); *Berkeley Bank For Coops. v. Meibos*, 607 P.2d 798, 801 (Utah 1980).

Although Bank One faults Bodell for not conducting an independent investigation of the representations made by Lightner, in *Condor*, the court of appeals recognized that "[g]enerally, a plaintiff may rely on positive assertions of fact without independent investigations." 739 P.2d at 638. In the case at bar, at the time Jenson delivered Lightner's August 22 letter to Bodell, Jenson represented that his lawyers had thoroughly reviewed the Mongoose transaction and that everything was okay and that Jenson was loaning $4 million of his own money for the transaction. In essence, Bodell was told that Jenson's lawyers had already conducted the necessary due diligence. Beyond that, Jenson told Bodell that there was great urgency to consummate the loan as Robbins had to acquire Cherokee & Walker's interest in the bicycle companies immediately so that he could go forward with his acquisition of Mongoose. (Bodell Depo. at p. 190 and 46.) Thus, there simply was no time for detailed due diligence even if Jenson had not represented that his own attorneys had already performed that due diligence. Bodell trusted Jenson based upon their past relationship.

The August 22 Lightner letter was, in fact, written by Benjamin Lightner who was a Senior Wealth Advisor at Bank One, which was one of the largest, if not the largest, banks in Utah and was well known and respected. Bank One knew and acknowledges in this case that people regularly rely on representations from banks - and for good reason, as banks are required to perform due diligence in advance of making representations like those made here. (SOF 124-

25.) There is ample evidence from which a reasonable jury could find that Bodell reasonably relied upon the representations contained in Lightner's August 22 letter.

In addition to the facts presented, Bodell has provided to Defendants the report of Gary Schwartz, an exceptionally well-qualified expert on banking standards, who opines in his report that individuals and businesses rely every day on representations made by banks. *See* Expert Report of Gary Schwartz, attached hereto as Exhibit 46.[6] Mr. Schwartz confirms that banks not only know that businesses rely on representations the banks make, they depend on that fact and the special relationship of trust banks strive to create in order to survive. Nobody will deposit money with or conduct business with a bank that cannot be trusted. As Mr. Schwartz testifies, that trust is the core foundation upon which the entire banking system in the United States rests. It is absurd that Bank One, one of the largest national banks in the country, is taking the position in this case that businesses cannot rely on letters it writes making specific representations about its customers and their transactions – and Bank One does not dispute that it wrote the letter here making exactly those kinds of representations

The cases relied upon by Bank One do not support its position that reasonable reliance is not a factual issue in the case at bar. For example, in *Larsen v. Exclusive Cars, Inc.*, 97 P.3d 714 (Utah App. 2004), which is one of the principal cases relied upon by Chase, the court of appeals reversed a summary judgment in favor of the defendant, holding that whether the plaintiff reasonably relied upon a saleman's representations that a truck had a new engine presented a

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[6] Mr. Schwartz was recently deposed and confirmed the opinions offered in his expert report.

genuine issue of material fact that precluded summary judgment despite the fact the plaintiff had signed a number of documents negating all warranties and oral promises. There was no indication that the plaintiff had investigated whether the truck indeed had a new engine. 97 P.3d at 716-717.

In *Forsberg v. Burningham & Kimball*, 892 P.2d 23, 26-27 (Utah App. 1995), cited by Bank One, the court of appeals actually affirmed the district court's factual finding after trial that the purchasers of a home reasonably relied upon the seller's representations concerning the boundaries of a lot.

Bank One also relies upon *Maack v. Resource Design and Construction, Inc.*, 875 P.2d 570 (Utah App. 1994), where summary judgment was entered that a purchaser did not reasonably rely upon the real estate agent's representation that there was a one year builder's warranty. That case is easily distinguished because there the plaintiff Robert Maack was an experienced attorney and he did not request, nor was he given, any information concerning the scope of the alleged warranty or ask to see the alleged warranty or require any reference to the alleged warranty in the written agreement between the parties. The court of appeals simply held that under these circumstances the plaintiff's reliance was not reasonable absent some further inquiry.

Finally, *Liggett v. Levy*, 136 S.W. 299 (Mo. 1911), a Missouri case almost 100 years old upon which Bank One relies, also involved far different facts. There, the letter written by the bank simply contained vague statements that an individual and his company were valued customers of the bank and their business had been satisfactory and they were "wide awake

businessmen." The court correctly concluded that these vague statements could not be relied upon to make a large loan.

The reasonable reliance issue, particularly on the evidence and testimony present here, requires a factual determination that must be made by the jury.

D. THIS COURT HAS ALREADY DETERMINED THERE IS NO ACCORD AND SATISFACTION PRECLUDING BODELL'S CLAIMS AGAINST BANK ONE AND BANK ONE CITES NO NEW LAW OR OTHER CIRCUMSTANCES JUSTIFYING RECONSIDERATION OF THE COURT'S PREVIOUS RULING. EVEN IF THE COURT WERE TO RECONSIDER THE ISSUE, THE QUESTION PRESENTED BY BANK ONE'S MOTION AT MOST RAISES A FACTUAL ISSUE THE JURY SHOULD RESOLVE AT TRIAL.

Bank One moves the Court for summary judgment on the basis that Bodell's settlement of its claims against Jenson and MSF for millions of dollars less than the amount owed Bodell on the loans constituted an accord and satisfaction that bars Bodell's claims against Bank One. Bank One's argument is nothing more than an effort to persuade this Court to reconsider and overrule Judge Bohling's decision on this very issue nearly three and one-half years ago and allow Bank One another bite at the same apple that years ago was fully chewed and digested.

Bank One filed on October 29, 2003 a motion for summary judgment, citing the same paragraph from Bodell's settlement agreement with Jenson and his company it cites in the instant motion, and asserting the same argument it makes here. Bank One's motion was fully briefed and argued to Judge Bohling, who correctly ruled that "no 'accord and satisfaction' was reached between Plaintiff Bodell on the one hand and the Jenson parties on the other." (*See* Judge Bohling's Order dated March 15, 2004.) Judge Bohling further stated he was not persuaded that

an accord and satisfaction operates to the benefit of third-parties unless those third-parties are expressly named in the agreement. (*Id.*)

Three and one-half years after Judge Bohling decided the issue, Bank One raises it again in the instant motion. Procedurally, Bank One's motion should be stricken because it did not move the Court under Rule 54(b) for reconsideration of Judge Bohling's ruling. Moreover, Bank One's motion should be stricken because it is completely unable to demonstrate that anything has changed since Judge Bohling's ruling that would justify reconsidering the ruling in a new light, or that Bank One has any relevant new evidence, or that the law has changed, or that the summary judgment motion was inadequately briefed or that the Court needs to correct any errors.

Litigation is not a best two out of three match. A party is not entitled to reconsideration of an earlier ruling just because it hopes to get a better result by judge shopping or hoping it can better present arguments available to it and which could have been presented in its original motion. Instead, a litigant may only properly obtain reconsideration of a decided issue where:

(1) The matter is presented in a 'different light' or other 'different circumstances;' (2) there has been a change in the governing law; (3) a party offers new evidence; (4) 'manifest injustice' will result if the court does not reconsider the prior ruling; (5) a court needs to correct its own errors; or (6) an issue was inadequately briefed when first contemplated by the court. *UPC, Inc. v ROA General, Inc.* 1999 UT App. 303, 990 P.2d 945, 958-959.

Bank One's motion is not presented in a different light or under different circumstances. Nothing has changed since Judge Bohling's decision. A motion that "merely 'rehash[es]

arguments already fully considered' in the court's summary judgment ruling" does not present matters in a different light. (*Id.* at 959.) Neither has there been any change in the governing law. Bank One relies on the same cases it previously cited to Judge Bohling. It appears Bank One cites in the instant motion only two cases not previously provided to Judge Bohling, one a 1977 Minnesota state court decision and the other a 1995 decision from Mississppi. No 'manifest injustice' will result if this Court refuses to reopen and reconsider Judge Bohling's decision. The Court does not need to correct any errors - there were none. The motion was exhaustively and competently briefed by Bank One's very capable counsel. In fact, entire sections of Bank One's previous briefing is merely "cut and pasted" into its new brief. There is no relevant new evidence that justifies reconsideration, and none is cited by Bank One in its brief.

Even if this Court were inclined to disregard Judge Bohling's ruling, Bank One's motion at best raises a fact question for the jury to resolve at trial. Bank One erroneously argues that Bodell's settlement of its claims against Jensen and MSF for millions of dollars less than the amount owed Bodell on the loans constituted an accord and satisfaction and bars his claims against Bank One.

As Bank One acknowledges, the elements of an accord and satisfaction are: (1) an unliquidated claim or a bonafide dispute over the amount due; (2) a payment offered as full settlement of the entire dispute; and (3) an acceptance of the payment as full settlement of the dispute. *ProMax Dev. Corp. v. Raile*, 998 P.2d 254, 259 (Utah 2000). None of these elements are satisfied in the case at bar.

An accord and satisfaction is a contract between the parties and is governed by normal contract principles. *See, Estate Landscape & Snow Removal Specialists, Inc. v. Mountain States Telephone & Telegraph Co.*, 844 P.2d 322, 326 (Utah 1992). As Judge Bohling found, the alleged accord and satisfaction between Bodell and MSF and Jenson was only to discharge their liability on the Note and Guaranty. The accord and satisfaction between those parties does not somehow bar claims against third parties such as Bank One because the contractual language of the accord and satisfaction does not so provide. If the Settlement Agreement had contained a provision that Bodell accepted the $3 Million in satisfaction of all obligations of not only MSF and Jenson but also of all claims against Bank One, then the accord and satisfaction would bar claims against Bank One. Absent such an express provision, the accord and satisfaction does not bar such claims. *See, e.g., In Re Dollar Time Group, Inc.*, 223 B.R. 237, 248 (S.D. Fla. 1998) ("An accord and satisfaction cannot be reached between parties other than those who were party to the original contract or claim. . . . The Agreement contained no expression of intent to settle claims" against non-parties.); *Bevelheimer v. Gierach*, 339 N.E.2d 299, 305 (Ill. App. 1975) (". . . an accord and satisfaction does not embrace or operate as a bar with respect to matters not contemplated by the agreement . . . and as a general rule an accord and satisfaction does not operate for the benefit of third persons."); *Mougey v. Salzwedel*, 401 N.W.2d 509, 513 (N.D. 1987) (the accord and satisfaction did not bar claims against a third party because the accord and satisfaction did not demonstrate an intent to bar claims against third parties); *Haesly v. Whitten*,

580 S.W.2d 104, 106 (Tex. App. 1979) (accord and satisfaction which settled lawsuit handled by the defendant attorney did not bar later malpractice action against the attorney.).

Bank One mistakenly seizes upon the following language in the Settlement Agreement for its argument that it has been released from liability:

> Bodell . . . acknowledges and agrees that the obligations of the MSF Parties in connection with the Loans, including all principal and interest that may have been deemed to have accrued thereon, are hereby deemed fully satisfied and repaid in full . . . . (Emphasis Added)

This language does not state that the amount owing on the debt has been paid in full, but only that the obligation of MSF and Jenson in connection with the loans are "deemed" fully paid and satisfied. The indisputable fact is that the $3 Million settlement did not pay the amount owing Bodell in full, but was millions of dollars short of the full amount owing.[7]

Bank One further argues that the language quoted above can only be interpreted to mean that the debt owing to Bodell has been fully paid because of other language in the Settlement Agreement releasing Jenson and MSF from liability. However, the fact that the agreement provided for a release and also that the "obligations of the MSF Parties . . . are hereby deemed fully satisfied and repaid in full" indicates nothing about an intent to release of claims against

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[7] Bank One mistakenly argues that under the parole evidence rule Bodell cannot contradict the language of the Settlement Agreement which supposedly acknowledges the full amount of the debt has been paid. In addition to the fact that the agreement does not state that the full amount of the debt has been paid as pointed out above, Bank One cannot rely upon the parole evidence rule. Utah law is clear that the parole evidence rule only applies in controversies between parties to a contract and those claiming under them. A stranger to the contract cannot invoke the parole evidence rule. *See, American Crystal Sugar Co. v. Nicholas*, 124 F.2d 477, 479-480 (10th Cir. 1941); *Olmstead v. Oregon Shortline R. Co.*, 76 P. 557 (Utah 1904).

third parties such as Bank One. As demonstrated below, because Bank One was not specifically named in the release, under Utah's Liability Reform Act, Bank One was not released.

Moreover, even if the Settlement Agreement on its face had acknowledged full payment of the debt (which it did not), the Settlement Agreement still was not an accord and satisfaction even as to Bodell, MSF and Jenson. One of the requirements for an accord and satisfaction is that there is "an unliquidated claim or a bona fide dispute over the amount due." *ProMax,* 998 P.2d at 259. As Judge Bohling found, no unliquidated claim was involved. Nor was there any dispute at all over the amount due. The amount due was simply a mathematical calculation of the principal plus the accrued interest - a calculation easily computed and provided to Defendants at the inception of this case and again as recently as this month when Bodell served the supplemental expert report of Merrill Weight.

Finally, even if it were assumed for argument that the Settlement Agreement constituted an accord and satisfaction as among Bodell, MSF and Jenson with respect to the liability of MSF and Jenson under the loans, that does not mean that Bank One is released from liability. Bodell does not seek recovery from Bank One under the August 30 Note or Guaranty. Bank One did not execute either document. Instead, Bodell seeks recovery in tort against Bank One for fraud and negligent misrepresentations that induced Bodell to make that loan to MSF.

Welt v. Sasson, 223 B.R. 237 (Bnkrptcy S. D. Fla. 1998) is instructive. In that case, the defendants were directors of two companies that agreed to merge. They caused one of the companies, Dollar Time, to make a $500,000 loan and transfer other assets to the other company,

Bargain. The merger fell threw and Dollar Time and Bargain entered into a Settlement Agreement pursuant to which Bargain agreed to transfer certain inventory to Dollar Time and the $500,000 loan was restructured. The parties subsequently agreed that in lieu of payment of the note, Bargain's affiliate would sublease retail space to Dollar Time for five years, during which time rents would be waived. This arrangement was to have saved Dollar Time $500,000 in rents. Dollar Time actually opened and operated a store at that location for a few months before filing for bankruptcy. The bankruptcy trustee for Dollar Time then filed suit against the defendants for breach of fiduciary duty in causing Dollar Time to make the $500,000 loan and other transfers to Bargain. The defendants argued that the Settlement Agreement between Dollar Time and Bargain constituted an accord and satisfaction which discharged Bargain's debt under the note and therefore barred any claim against the defendants. The court rejected this argument, stating:

> An accord and satisfaction cannot be reached between parties other than those who were party to the original contract or claim. . . .
>
> While it is true that the Settlement Agreement did represent an accord to settle all claims between Dollar Time and Bargain, the Agreement contained no expression of an intent to settle the claims between Dollar Time and Sasson and Klansky individually. . . . Because the parties to the Settlement Agreement were Dollar Time and Bargain, the Agreement does not document an accord and satisfaction between the parties to this action. 223 B.R. at 248.

The simple fact in the case at bar that Bank One cannot escape is that the amount of the debt that MSF and Jenson owed to Bodell with respect to the August 30 loan was <u>not</u> repaid in full. Thus, Bodell was damaged by being induced to make the loan by Bank One's fraud and

negligent misrepresentations. Under the Utah Liability Reform Act, Utah Code Annotated Section 78-27-42 (the "LRA"), Bodell's release of MSF and Jenson from further liability for payment of the unpaid balance of the loan did not release any other person or entity not named or specifically identified in the release, including Bank One. Because there is no language in the Settlement Agreement indicating that part of the bargain was to release claims against Bank One, under the provisions of the LRA neither the alleged accord and satisfaction nor the express release contained in the Settlement Agreement bar claims against Bank One. Section 78-27-42 provides:

> A release given by a person seeking recovery to one or more defendants does not discharge any other defendant unless the release so provides. (Emphasis Added)

In turn, Utah Code Annotated, Section 78-27-37(1), defines a defendant as: "A person . . . who is claimed to be liable because of fault to any person seeking recovery." In *Child v. Newsome*, 892 P.2d 9, 11 (Utah 1995), the Utah Supreme Court explained the purpose for the enactment of the LRA as follows:

> Section 78-27-42 was enacted to repeal Section 15-4-4 of the Joint Obligations Act, which had codified the common law rule that a release of one tort-feasor also released all other tort-feasors. The statute was designed to retain the liability of tort-feasors and reverse the common law rule "so that release of one joint tort-feasor did not automatically release all tort-feasors." (Citations omitted)

The LRA requires that a release "must contain language either naming the defendant or identifying the defendant with some degree of specificity in order to discharge that defendant

from liability." *Child*, 892 P.2d at 12. *See also Nelson*, 935 P.2d at 514; *Stevensen v. Goodson*, 924 P.2d 339 (Utah 1996); *Thornock v. Jensen*, 950 P.2d 441, 443-444 (Utah App. 1997). In the case at bar, the release of MSF and Jenson does not name Bank One or identify Bank One with any degree of specificity, or at all. Thus, the release of MSF and Jenson from liability on the loans does not release Bank One from liability for wrongfully inducing Bodell to make the August 30 loan.

The cases cited by Bank One do not support its argument that it has been released from liability. Indeed, only two of the cases even involved an issue of accord and satisfaction or of joint liability of tortfeasors. In *Luxemburg v. Can-Tex Industries,*, 257 N.W.2d 804 (Minn. 1977), cited by Bank One, the Minnesota Supreme Court reversed the dismissal of a complaint, ruling that the settlement of the plaintiff contractor's claims against a village relating to a construction project did no operate as a release and discharge of plaintiff's claims against other joint tortfeasors because the plaintiff had not been paid in full and there was no intent to release the defendants. The court stated in this regard that the language of a release is not conclusive on the issue of intent. *Id.* at 807-808. In *ProMax*, *supra*, cited by Bank One, the court simply held that a contractor entered into an accord and satisfaction with the purchaser of a house by closing the sale and accepting payment from the purchaser. There was no issue in the case of liability of co-tort-feasors or co-obligors. And, there was a bona fide dispute as to the amount owing by the purchaser.

E. AT THE VERY LEAST, A JURY QUESTION EXISTS ON WHETHER BANK ONE HAD A PECUNIARY INTEREST IN THE TRANSACTION.

Bank One insists that Bodell cannot recover on its negligent misrepresentation claim because Bank One supposedly did not have a pecuniary interest in the Bodell loan. (Bank One Memo. at 13.) There is, however, ample evidence in this case from which a reasonable jury could find that Bank One did have a pecuniary interest.

Robbins, Jenson and the bicycle companies were customers of Bank One and acknowledged as such by Lightner in his various letters. Lightner stated in his July 27, 2000 letter to Brunswick Corp. that "Madtrax Group, LLC. . . and several members of management have been long-time customers with Bank One" and that "[o]ver the years, Bank One and the Company had partnered together to complete several successful business transactions." (Lightner Depo. at pp. 219.) At the time Lightner wrote his August 22 letter, Bank One stood to receive a substantial financial benefit if Robbins and Jenson were able to acquire Mongoose and give Bank One additional business. Further, as of August 22, 2000, Robbins was indebted to Bank One in an amount that cannot be confirmed because Bank One has lost or destroyed relevant account documents and records necessary to establish the exact amount. Regardless, Robbins' own correspondence with Bank One establishes that he had at in 2000 at least two lines of credit with Bank One totaling $3.3 million. (Robbins' April 24, 2001 Letter to Bank One, attached as Exhibit 47.) Bank One stood to benefit financially if Robbins was able to acquire Cherokee & Walker's interest in the bicycle companies and acquire Mongoose and repay his loan

out of profits. Of course, Bank One also had agreed to serve as escrow agent for both the $16.5 million deposit MadTrax was required to make as a condition precedent to obtaining the $165 million loan from Arimex, as well as the $165 million loan itself. As Bank One acknowledges, it profits from such arrangements.

Notwithstanding the evidence here, courts have not required a direct pecuniary interest in a transaction. Rather an indirect pecuniary interest is sufficient, as recognized by the court in Bank One's own cited case of *Reimsnyder v. South Trust Bank, N.A.*, 846 So.2d 1264, 1267 (Fla. App. 2003). And, the transaction requirement is broadly construed. *See, Geosearch, Inc. v. Howell Petroleum Corp.*, 819 F.2d 521, 525-526 (5th Cir. 1987). Indeed, "[t]he fact that the information is given in the course of the defendant's business, profession or employment is a sufficient indication that he has a pecuniary interest in it, even though he receives no consideration for it at the time. It is not, however, conclusive." *Id.,* citing Restatement (Second) of Torts, § 552(1), Comment d. *See also, Robinson v. Tripco Inv., Inc.*, 2000 UT App 200, ¶ 31, 21 P.3d 219, 226-227; *MSA Tubular Products, Inc. v. First Bank & Trust Co.*, 869 F.2d 1422, 1424-1425 (10th Cir. 1989); *Cypress Oilfield Contractors, Inc. v. McGoldrick Oil Co., Inc.*, 525 So.2d 1157, 1162 (3rd Cir. 1988).

The cases relied upon by Bank One do not demonstrate that Bank One had no pecuniary interest in the subject transactions. In *Gildea v. Guardian Title Company of Utah*, 970 P.2d 1265, 1271-1272 (Utah 1998), relied upon by Bank One, the Supreme Court only recited the elements of a negligent misrepresentation cause of action. The existence of a pecuniary interest

was not an issue in the case. In *Reimsynder*, *supra*, the only other case cited by Bank One, a bank officer simply told the plaintiff that a bank customer was a reputable company. There was no evidence that the bank had any direct or even indirect pecuniary interest in the transaction. Further, the court distinguished the general statement made by the bank officer from situations where a bank makes representations concerning the size of deposits and the credit worthiness of its customers based upon their dealings with the bank. In the case at bar, Lightner made specific representations concerning the $165 million deposit coming from the Arimex loan and, as demonstrated above, there is ample evidence from which a jury could find that Bank One had a pecuniary interest in the transactions.

F. WHETHER BANK ONE WAS IN A SUPERIOR POSITION TO ASCERTAIN THE TRUE FACTS CONCERNING THE $165 MILLION DEPOSIT AND THE ARIMEX LOAN PRESENTS A QUESTION OF FACT FOR THE JURY.

Bank One next argues that as a matter of law it was not in a superior position to ascertain the true facts concerning the $165 million deposit supposedly coming from the Arimex loan. (Bank One Memo. at 15.) Once more, Bank One ignores highly relevant evidence from which a reasonable jury could easily find to the contrary. Importantly, the fact that Lightner admits he knows the statements in his August 22 letter were false by itself is sufficient to demonstrate he was in a superior position to know the true facts. But, there is much more evidence.

Robbins, Jenson and the bicycle companies were customers of Bank One. Bank One had detailed information concerning their financial condition. Lightner was the private banker for Robbins and Jenson and had frequent and regular communications with Robbins during 2000.

(SOF ¶¶ 27-36.) Robbins was a personal friend of Lightner's and offered Lightner a job while Lightner was employed by Bank One. (SOF ¶¶ 27-36.) Bank One declined any financing for Robbins and his bicycle companies with respect to the Mongoose acquisition because Robbins did not have the necessary resources. (SOF ¶ 53.) Of course, Bank One would have to have obtained financial information about Robbins and his companies even to draw that conclusion. Lightner was personally involved in the efforts of Robbins and Jenson to acquire Mongoose. (SOF ¶¶ 27-36, 57.) Among other things, Lightner wrote letters at Robbins's request falsely representing the financial strength of Robbins and Jenson and the bicycle companies. Lightner also attended a meeting with Robbins and Arimex to discuss a potential loan. (SOF ¶¶ 27-36, 57.) Robbins kept Lightner informed of "everything that was going on" with the Mongoose deal and potential financing. (SOF ¶ 56.)

Lightner admits that the letters he wrote to assist Robbins and Jenson in their efforts to acquire Mongoose were false. (SOF ¶¶ 105-125.) As discussed in more detail above, a reasonable jury could certainly conclude based upon this and other cited evidence that Lightner was well aware of the financial condition of Robbins, Jenson and the bicycle companies and their efforts to obtain financing by making fraudulent representations concerning their financial condition and that in fact Lightner conspired with them in their attempt to acquire Mongoose by making egregiously false representations concerning their financial condition. A reasonable jury could also find that Lightner knew it was highly unlikely that the Arimex loan would be made both because Robbins did not have $16.5 million to deposit in escrow, which was a condition

precedent to the Arimex loan, and because the loan would only be made if Robbins was successful in acquiring Mongoose, which was highly unlikely.[8] *cf., Christenson v. Commonwealth Land Title Ins. Co.*, 666 P.2d 302, 306 (Utah 1983); *Maack*, 875 P.2d at 576.

Bank One argues that Bodell had a previously existing relationship with Jenson because they had been neighbors 20 years earlier for a short time and because Bodell had a few months earlier loaned Jenson $1 million. Unlike Bank One, however, there is no evidence that Bodell had any knowledge concerning the ability of Robbins, Jenson or the bicycle companies to acquire Mongoose or to close the Arimex loan or the terms of the Arimex loan. Beyond that, Bodell did discuss the transactions with Jenson who falsely told him the Mongoose purchase was a "done deal" and did not disclose the other facts above to Bodell. (SOF ¶¶ 38, 45 and 75.)

Hit Products Corp. v. Anchor Fin. Corp., 111 F.Supp.2d 723 (D. S.C. 1999), cited by Bank One, where the court held that the bank was not in a superior position with respect to representations regarding its customer, involved far different facts and does not assist Bank One's argument that the superior position issue can be decided as a matter of law. In that case, the plaintiff had been engaged in an extensive, ongoing business relationship with the bank's customer for many years. At the time the bank filled out a form stating that it had an excellent relationship with the customer for a number of years and that the customer maintained balances

---

[8] Bank One argues that Bodell had access to the information because it could have contacted Arimex There is no evidence that Bodell knew how to contact Arimex or that Arimex would have disclosed information to Bodell or that Arimex knew the true financial condition of Robbins, Jenson and the bicycle companies or that there was any way they could consummate the Arimex loan even if Arimex had the ability to fund the loan or that Robbins was looking for other financing sources. Of course, Lightner met directly with Arimex at Robbins' request

ranging from $25,000 to $350,000, always paid promptly and that cash flow was sufficient for business operation, the customer owed a delinquent debt to the plaintiff of over $1 million and the plaintiff did not inform the bank about the large debt. It was under those circumstances that the court held that the bank was not in a superior position to know the true facts.

The jury must determine as a fact issue at trial whether Bank One was in a superior position to know the true facts concerning the supposed $165 million deposit and the Arimex loan.

G. BODELL WAS A FORESEEABLE RECIPIENT OF THE AUGUST 22 LIGHTNER LETTER.

The final argument asserted by Bank One is that Bodell cannot recover for negligent misrepresentation because Bodell was supposedly not a foreseeable recipient of Lightner's August 22 letter. To make this argument, Bank One has been forced to once again ignore substantial highly relevant evidence from which a reasonable jury could find that Bodell was within the class of persons whom Lightner intended or had reason to expect would receive the letter and act thereon.

The fact that Bank One claims Lightner did not intend that the representations contained in the letter be given specifically to Bodell is unimportant.[9] The letter was written "To Whom It May Concern," not to Lincoln Partners or any other specific person or entity. This is the best evidence in the case about to whom Bank One was directing the letter – to anyone concerned

[9] Neither Lightner nor Bank One offered any testimony concerning Lightner's intent when drafting the letter requested by Robbins Rather, Bank One relies exclusively on the testimony of co-defendant Robbins on this point.

with the subject matter of the letter, namely MadTrax, Robbins, Jenson and massive loans. The fact that Bank One now identifies as the intended recipient someone other than the specific addressee it named in the letter only serves to raise a factual question about which is correct - the letter itself, or Robbins's testimony after the fact that Bank One now adopts on this issue.

Of course, Bank One has acknowledged through its Rule 30(b)(6) designees that the problem with writing a letter addressed "To Whom It May Concern," and the reason standard banking practice dictates such letters not be written, is that any number of people may rely on such a letter. (Lightner Depo. at p. 248; Mayo Depo. at p. 100.) A reasonable jury could easily conclude on that basis alone that the letter was written to assist the efforts of Robbins and Jenson and their companies in their contemplated business transactions and/or to raise money in order to purchase Cherokee & Walker's interest in the companies it owned jointly with Robbins and to fund the purchase of Mongoose Bicycles.

The significance of the fact that the Letter was addressed "To Whom It May Concern" is underscored by the fact that ten other letters written by MadTrax and its agents and sent to Brunswick and its agents (including Lincoln Partners) were all correctly and specifically addressed. (*See* Letters, Exhibits 34-35 and 38-45.) For example, the October 19, 2000 letter Lightner sent to Lincoln Partners making similar misrepresentations was addressed to "Rob Brown, Vice President, Lincoln Partners, LLC," and on July 27, 2000, nearly a month prior to writing the August 22 Letter, Lightner signed a letter making similar misrepresentations addressed specifically to "James Schenk, Vice President, Brunswick Corporation." (*See* Exhibit

40.) A reasonable jury could certainly conclude that if Lightner only intended that his August 22 Letter be given to Lincoln Partners he would have specifically addressed the letter to Lincoln Partners as he specifically addressed the other two letters to the companies to which they were directed.

Bodell was in the class of potential financiers and the letter was given to Bodell for the very purpose of inducing it to lend $4 million to Jenson to be immediately paid by Jenson to Robbins to fund the repurchase of Cherokee & Walker's interest. Lightner knew full well that Jenson and Robbins were working together to raise funding, as the letter itself plainly demonstrates. Indeed, Lightner states in his August 22 letter "MadTrax . . . and its individual members Mark Robbins and Marc Jenson . . . will be depositing $165,000,000 . . . ."

> Section 531 of the Restatement (Second) of Torts provides:
> One who makes a fraudulent misrepresentation is subject to liability to the persons ***or class of persons whom he intends or has reason to expect to act or to refrain from action in reliance upon the misrepresentation***, for pecuniary loss suffered by them through their justifiable reliance in the type of transaction in which he intends or has reason to expect their conduct to be influenced. (Emphasis added)

See, e.g., Soderberg v. McKinney, 44 Cal. App.4th 1760 (1996) (real estate appraiser liable to investors for negligent misrepresentation and fraud even though he did not know their names or identities at the time he made his misrepresentations because it was foreseeable the appraisal would be given to and relied upon by the investors); *Reisman v. KPMG Peat Marwick L.L.P.*, 787 N.E.2d 1060, 1067-1068 (Mass. App. 2003) (accounting firm liable for false statements in the audit because plaintiffs were among those whom the accounting firm had reason to expect

would rely on the statements because they were potential investors.); *Texas Capital Securities, Inc. v. Sandefer*, 58 S.W.3d 760, 772-773 (Tex. App. 2001); *Woodward v. Dietrich*, 548 A.2d 301, 309-310 (Pa. Sup. 1988); and *Citizens State Bank Moundridge v. Gilmore*, 603 P.2d 605, 610-611 (Kan. 1979).

The issue of the class of persons to which Lightner's August 22, 2000 Letter was intended is a question of fact the jury will have to decide after hearing and weighing all the evidence at trial. The evidence shows that potential financiers for Jenson and Robbins was the class whom Jenson, Robbins and Lightner had in mind when creating the August 22, 2000 Lightner Letter, and that Bodell was a member of that class. Lightner had substantial knowledge concerning Robbins' and Jenson's business and was significantly involved in their financing efforts. Robbins himself testified he kept Lightner fully informed of "everything that was going on" with respect to the financing for the deal, and that he was "in constant contact" with Lightner about these transactions. (Robbins Depo. at 326, 330- 31.) Lightner knew that Cherokee & Walker owned part of at least one of Robbins' companies and that Robbins was going to buy out Cherokee & Walkers' interest. (Lightner Depo. at 41-42; 107-08.) Lightner believes it likely that Bank One had conversations with Cherokee & Walker and Robbins about their business. (*Id.* at 203-04.) As evidenced by Bank One's refusal to make additional funding available to him, Lightner knew Robbins did not have the money needed to buy out Cherokee & Walker's interest. Accordingly, Lightner knew Robbins would need to raise the funds. In fact, Lightner knew that Robbins was seeking funding for his transaction. (*Id.* at 157-58.)

Lightner knew that Robbins and Jenson were partners. (Lightner Depo. at 39; 199-200.) Lightner knew Robbins and Jenson were close enough that they did deals on the strength of merely a handshake. (*Id.* at 199-200.) Lightner knew that Jenson and Robbins were "always lending money to each other." (*Id.* at 39.) While denying having any specific memory of the reason, Lightner testified he took numerous checks to Cherokee & Walker at the direction of Robbins or Jenson, likely in the year 2000, as an employee of Bank One. (*Id.* at 40-41.) Lightner knew that Robbins received money from Jenson in 2000, and though admittedly fuzzy on the details, Lightner even admits he believed Robbins used that money to re-acquire Cherokee & Walker's interest in Robbins's companies. (*Id.* at 259-60.)

Of course, the timing surrounding the Lightner Letter also raises compelling inferences that Jenson, Robbins and Lightner specifically intended the letter for Bodell, though Bodell need not make such a showing to establish liability. To that end, the evidence shows that Robbins was desperate by mid-August for an $8 million loan to buyout Cherokee & Walker before they seized Robbins' bicycle companies, thus depriving Robbins of any chance to successfully close his bid for Mongoose. (SOF ¶¶ 1-48.) By that date Robbins had missed seven promised payment deadlines for Cherokee & Walker, which had retained counsel and initiated the legal process to seize control of the jointly owned companies. (SOF ¶¶ 19-23.) Robbins finally secured on August 15 a commitment from Jenson for the $8 million loan, but as Jenson explained to Robbins, Jenson was only putting up $4 million himself, with the other $4 million coming from Bodell. (SOF ¶¶ 38-41.) Under their agreement, Jenson was to fund the $8 million for Robbins

on August 15. (*See* August 9, 2000 Commitment Letter, attached as Exhibit 22.) Bodell, however, was struggling with the size of the transaction and had not yet committed to loan the $4 million Jenson needed to get the full $8 million to Robbins. (SOF ¶ 45.) As time ticked by, Robbins ran out of options. Finally, on August 22 he approached Lightner and obtained the August 22, 2000 Lightner Letter making specific representations about $165 million coming into Bank One to be managed by Robbins and Jenson, who Lightner identified as members of MadTrax. (*See* Lightner Letter, attached as Exhibit 25.) In fact, Jenson was not a member of MadTrax at the time, and a jury could easily conclude the only reason for his name to appear in the Bank One letter was tie Jenson to Robbins and his purported Arimex loan transaction. Of course, Robbins obtained the letter from Bank One, promptly gave it to Jenson, who told Robbins he was going to show it to Bodell, and then Jenson did exactly that. (SOF ¶ 74.) The Lightner Letter served its purpose, pushing Bodell over the edge and causing Bodell to commit to the $4 million loan. Bodell signed an agreement and made the $4 million loan to Jenson on August 30, eight days after Robbins obtained the false letter from Bank One. Jenson in turn gave the $8 million to Robbins, who paid Cherokee & Walker in full.

A reasonable jury could easily conclude based on these facts that Lightner intended the letter to be shown to potential financiers or had reason to expect that would occur. In this regard, the fact that Robbins testified in his deposition that he wanted the letter for the purpose of (falsely) demonstrating his financial strength to Lincoln Partners is not conclusive on that issue. It is obviously in Robbins's interest as a Defendant in this case named in a separate fraud count

to attempt to establish that Bodell has no claims based on the letter because, as Robbins has already testified, he knew that the statements contained in the letter were false and he has potential liability based on those false statements. A jury may simply believe, especially in light of the contradictory evidence, that Robbins' claim is self-serving and not credible. Notably, when asked directly if he told Lightner he intended to show the August 22, 2000 Letter to potential investors, Robbins reply was "I don't recall." (Robbins Depo. at 325-326.) Moreover, Lightner (for Bank One) did ***not*** testify that he intended that the letter be given only to Lincoln Partners. Significantly, Jenson testified he told Robbins he was going to show the August 22 Lightner letter to Bodell to persuade Bodell to loan $4 million for the acquisition of Cherokee & Walker's interest. (SOF ¶ 74.)

Bank One can offer no explanation why the August 22, 2000 letter is not in Lincoln Partners' files if, as Bank One contends, Lincoln Partners was the intended recipient. Bank One subpoenaed Lincoln Partners' records in this case and received documents in response. Those responsive documents include numerous other letters and documents, including other letters from Lightner and Bank One. The August 22, 2000 Letter, however, was nowhere to be found. Confirming that Lincoln Partners never received the August 22, 2000 Letter, David Houser and Robert Brown, both employed with Lincoln Partners at the time, and working as Brunswick's agents on Robbins' transaction, testified they had no recollection of ever having seen the letter. (Houser Depo. at 51-52; Brown Depo. at 73.) They did, however, have a clear recollection of

other letters and documents sent by Lightner, and they remembered telephone calls with Lightner concerning those documents. (Houser Depo. at 16-18, 38-41; Brown Depo. at 55-61.)

One of the documents that was in Lincoln Partners' files was a letter written by Lightner on Bank One letterhead dated October 19, 2000, addressed to Brown at Lincoln Partners. (*See* Exhibit 35.) That letter recites many of the same misrepresentations contained in the August 22, 2000 letter relied upon by Bodell. (*Compare* Exhibit 25 and Exhibit 35.) The October 19, 2000 letter makes no reference whatsoever to the August 22, 2000 letter. A reasonable jury could conclude that Robbins confused the two letters in his testimony, or simply disbelieve his testimony for any number of reasons including bias or his claimed poor recollection of many of the related events. Indeed, there would be no reason to send the October 19 letter to Lincoln Partners if the August 22 letter had already been sent.

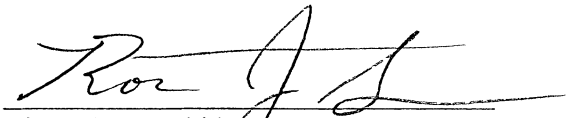
Lightner obviously intended some person or class of persons receive and rely on the misrepresentations he made in the August 22, 2000 Letter. Clearly, whether Lightner intended his August 22 Letter to be given only to Lincoln Partners or to anyone in the class of potential financiers and/or whether he had reason to expect that it would be given to a member of the class of potential financiers are questions of fact for the jury to decide based on all the evidence at trial, and particularly after the jury has an opportunity to assess for themselves the credibility of Robbins's testimony in light of all the contradictory evidence.

IV. CONCLUSION

For the foregoing reasons, it is respectfully submitted that Bank One's motion for summary judgment should be denied.

DATED this 13th day of August, 2007.

BURBIDGE MITCHELL & GROSS



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CERTIFICATE OF SERVICE

On the date below written, the undersigned hereby certifies that a true and correct copy of the foregoing **PLAINTIFF BODELL CONSTRUCTION COMPANY'S MEMORANDUM IN OPPOSITION TO MOTION FOR SUMMARY JUDGMENT OF DEFENDANT BANK ONE** was sent via e-mail and mailed with all first-class postage pre-paid to:

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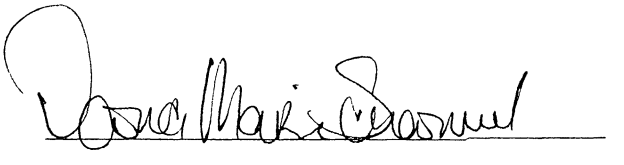
DATED this 3rd day of August, 2007.



Tab 8

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IN THE THIRD JUDICIAL DISTRICT COURT
IN AND FOR SALT LAKE COUNTY, STATE OF UTAH

BODELL CONSTRUCTION COMPANY, a Utah corporation, Plaintiff, v. MARK H. ROBBINS; CHEROKEE & WALKER INVESTMENT COMPANY, L.L.C., a Utah limited liability company; CHEROKEE & WALKER, L.L.C., a Utah limited liability company; BANK ONE, UTAH, NATIONAL ASSOCIATION, a national banking association, and DOES 1 through 50, Defendant.	**REPLY IN SUPPORT OF BANK ONE'S MOTION FOR SUMMARY JUDGMENT ON PLAINTIFF'S FRAUD AND NEGLIGENT MISREPRESENTATION CLAIMS** Civil No. 030917018 Judge John P. Kennedy

Defendant JPMorgan Chase Bank, N.A., as successor by merger to Bank One, N.A. ("Bank One"), respectfully submits this Reply in Support of its Motion for Summary Judgment on Plaintiff's Fraud and Negligent Misrepresentation Claims.

INTRODUCTION

In its Motion for Summary Judgment, Bank One presented seven separate legal theories on which summary judgment could be entered. The statement of undisputed material facts to support these seven theories consisted of a total of 42 paragraphs. In response, Plaintiff Bodell Construction Company ("Bodell") submitted no less than 52 pages of disputations of facts and additional facts it claims are material. The sheer volume of the injected facts makes the task of the Court to identify facts that are truly material and disputed very difficult.

Bank One will address this tactic by focusing this Reply on two legal theories advocated in its Motion that do not involve fact disputes, and which standing alone entitle Bank one to summary judgment. In doing so, Bank One will continue to assert the five other theories not addressed in this Reply and will be prepared to address those five other theories at oral argument.[1]

These two defenses are basic concepts of law and each is case dispositive. Simply stated, Bodell's reliance, to the extent it existed at all, on the Lightner Letter was not reasonable, and, secondly, a later settlement agreement between Bodell and Jenson constituted an accord and satisfaction of the claims against Bank One.

[1] Defendant Mark Robbins has separately moved for summary judgment. Some of the arguments raised by Robbins duplicate those raised by Bank One. To economize and simplify the Court's work, Bank One will not revisit those arguments in this Memorandum but joins and incorporates by reference those arguments made by Robbins. Those arguments are: (1) No representation of a presently existing material fact, and (2) Bodell was not a foreseeable recipient of the Lightner Letter.

STATEMENT OF UNDISPUTED FACTS

Many of the "facts" injected by Bodell are either not material or consist in substantial part of opinion, overstatement and characterization rather than record evidence.[2] Additionally, Bodell repeatedly cites to extensive portions of the record to dispute a single sentence of an undisputed fact propounded by Bank One.[3] However, for the reasons explained above, Bank One will not refute these 52 pages of injected facts in this Reply and will instead focus on two theories for which the necessary supporting facts are minimal and undisputed.

ARGUMENT

I. BODELL'S RELIANCE ON THE LIGHTNER LETTER IN MAKING A $4 MILLION UNSECURED LOAN WAS UNREASONABLE.

In measuring the existence or reasonableness of reliance upon a written instrument, one would expect the terms of the instrument to match those upon which reliance is placed. Stated another way, if Bodell truly relied upon the Lightner Letter for comfort in getting its loan repaid, then the Lightner Letter should, at a minimum, contain some terminology that Bodell could point to that would support its expectations. In this case, Bodell claims it relied upon the Lightner Letter to provide long term financing and to get its bridge loan repaid. Bodell should be able to

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[2] For example, in its first dispute of fact, Bodell discusses whether a particular entity was legally organized (Plaintiff Bodell Construction Company's Memorandum in Opposition to Bank One's Motion for Summary Judgment ("Opp.") at vi, ¶ 2), a matter of no significance whatsoever to the arguments raised by Bank One. Another example: In Paragraph 5, Bodell provides a conclusion, "... the evidence overwhelmingly establishes that ..." instead of a fact citing to the record. Opp. at vii, ¶ 5.

[3] For example, in disputing Paragraph 5 of the undisputed facts, Bodell cites to its Statement of Additional Material Facts, Paragraphs 1-49, 74-78, and 98-104. Citing to 61 paragraphs of Additional Material Facts to dispute a single fact is not a dispute "supported by citation to supporting materials" contemplated by Rule 7(c)(3)(B) of the Utah Rules of Civil Procedure. It is impossible to refute in an understandable manner a citation to 61 paragraphs.

read to the Court the precise language in the Lightner Letter that says there will be repayment, or that there will be long term financing, or that the monies referred to in the letter are for its benefit The letter says nothing of the sort The Lightner Letter consists of four sentences The first sentence identifies the entities that will be depositing money into an account at Bank One The second sentence identifies the source of the funds The third sentence says the monies will be deposited into an interest bearing account and who will be the fund's manager The fourth sentence invites questions with respect to the matter That is the sum total of the letter upon which Bodell claims it relied for repayment of the bridge loan There is not one word concerning bridge loans, long term loans, repayment, ownership of the funds, assignment of interests in the funds, length of time the funds will be on deposit, disposition of the funds or security interests in the funds There is no mention of Bodell, no mention of collateral, no mention of use of the funds, no mention of the purpose of the funds or the deposit Bodell simply points to a document and states that this is what it relied on In essence, Bodell's position is that it relied upon a letter that contained none of the terms Bodell was relying on In the absence of even a scintilla of terminology in the letter that Bodell could rely on, the court should find as a matter of law there could not be and there was no reliance, and should hold that a person cannot rely upon something that does not exist Furthermore, Bodell did not even contact the purported author of the letter to confirm Bodell could reply upon the information contained in the letter or that the letter pertained even tangentially to the multi-million dollar loan it was about to make

Not only is Bodell's alleged reliance on the Lightner Letter blatantly unreasonable on its face, the testimony of Michael J Bodell, the President of Bodell, shows that in fact he was not

relying on the Lightner Letter but upon a separate oral representation by Marc Jenson. The real representation Bodell was relying on was the oral representation by Jensen that the proceeds of the Arimex loan would be available to pay the Bodell loan. This representation is not even contained in the Lightner Letter, further demonstrating the unreasonableness of the claimed reliance on the letter. Mr. Bodell testified:

> Q. Can you give me a list of the factors that you relied on that led you to the conclusion to make that loan?
>
> A. Well, the overwhelming one was the confirmation of funds going into their account, the source of repayment.
>
> Q. The letter from Mr. Lightner?
>
> A. Yeah.
>
> Q. What else?
>
> A. Well, the assurances from Jenson that he would see that he was -- that as soon as this money came in, he would pay us immediately.
>
> Q. What else did you rely on?
>
> A. Nothing, really.

Bank One Mem. in Support of Mot. for Summ. J. at Ex. 39, Bodell Dep. at 61.

Bodell's reliance was on the proceeds of the Arimex loan being available to pay the Bodell loan. Marc Jenson – not Bank One – made this representation. The Lightner Letter does not say anything about the Arimex loan proceeds being available to pay the Bodell loan. To rely on the Lightner Letter to show the Arimex loan proceeds would be available to Bodell is patently unreasonable.

Bodell had no relationship whatsoever over with Bank One – Bodell was not a customer of the Bank, had no accounts at the Bank, and did not know who Mr Lightner was (Bank One Statement of Undisputed Material Facts ("BO SOF"), ¶ 32) The Lightner Letter was not addressed to Bodell (BO SOF ¶ 7) Bodell never contacted Bank One to verify the contents of the Lightner Letter BO SOF, ¶ 28) Bodell did not conduct any due diligence concerning Arimex (BO SOF, ¶ 29) Making a $4 million unsecured loan under those circumstances, relying upon the Lightner Letter as the source of repayment, is conclusively unreasonable

Even Bodell's own expert witness has testified it would be unreasonable for Bodell to rely on the Lightner Letter to establish that Bodell could be paid from the proceeds of the Arimex loan Gary Schwartz, described by Bodell as "an exceptionally well qualified expert on banking standards" (Opp at 9), testified in his deposition

> Q And it wouldn't have been reasonable for him to rely on that any portion of the $165 million would be available to repay him, would it? That's not a fact stated in the letter?
>
> A That's correct
>
> Q So you are agreeing it would not be reasonable for Bodell to assume he could be repaid out of the $165 million based on the text of the letter?
>
> A Based upon this letter, that is correct

Exhibit A, Schwartz Dep at 112, 114 Bodell's own expert even agrees that Bodell could not have reasonably relied on the Lightner Letter for the idea that it would be repaid out of the $165 million deposit Yet, as described above, that is exactly the point on which Bodell claims to have

relied on in the Lightner Letter.

Like any other fact issue normally reserved for the jury, the reasonableness of reliance may be decided on summary judgment where there is no dispute of material fact. *Larsen v. Exclusive Cars, Inc.*, 97 P.3d 714, 715 (Utah Ct. App. 2004) ("There are instances where courts may conclude that, as a matter of law, there was no reasonable reliance.") (citations omitted). There is no dispute of material fact in this case and Bodell cannot show reasonable reliance by clear and convincing evidence. The court, not the jury, should decide this issue.

Bodell attempts selectively to distinguish some of the cases cited by Bank One. Opp. at 9-11. Yet Bodell cannot undermine the notion that where there is no dispute of material fact, it is proper to decide the issue of the reasonableness of reliance on summary judgment. Notably, Bodell does not mention *Jardine v. Brunswick Corp.*, 423 P.2d 659 (Utah 1967), a case similar to the instant one in significant respects. In *Jardine*, a business man advanced funds to a developer, and claimed to have done so based on a third party's representations that the developer "could build these buildings and finance them; and there is nothing to worry about." *Jardine*, 423 P.2d at 661. The Utah Supreme Court actually reversed a jury verdict, finding reliance on this and other representations was not reasonable. Concerning the "nothing to worry about" comment, the court noted that at the time it was made, the author of the letter "was not making any representation about [the borrower] as a credit risk for a loan from [plaintiff]." *Jardine,* 423 P.2d at 662. So here, there is no evidence that Lightner was making a representation about Jenson's creditworthiness. Bodell "cannot heedlessly accept as true whatever is told him, but has the duty of exercising such degree of care to protect his own interests as would be exercised by an

ordinary, reasonable and prudent person under the circumstances; and if he fails to do so, is precluded from holding someone else to account for the consequences of his own neglect." As a matter of law, Bodell has not shown that it acted reasonably in relying on the Lightner Letter. This is particularly true in light of the requirement that it make that showing by clear and convincing evidence. *See Jardine,* 423 P.2d at 663.

Plaintiff also ignores *Brown v. Weis*, 871 P.2d 552 (Utah Ct. App. 1994) in which the Court of Appeals affirmed summary judgment holding reliance had been unreasonable where the plaintiffs, sophisticated business people like Bodell's president, Michael J. Bodell, were held as a matter of law not to have reasonably relied on a third party's characterization of a balance sheet, where the plaintiffs themselves had "adequate opportunity to review the underlying data for themselves." *Brown,* 871 P.2d at 562-63. So here, Bodell had adequate opportunity to review the underlying data for itself. Summary judgment is therefore appropriate.

II. THE SETTLEMENT AGREEMENT CONSTITUTES AN ACCORD AND FULL SATISFACTION OF THE CLAIMS IN THIS ACTION

Bank One's opening brief asked the Court to interpret the Settlement Agreement between Bodell, MSF Properties, L.C. ("MSF") and Jenson as a matter of law and determine that it constitutes an accord and satisfaction of the debt owing to Bodell, thereby satisfying the damages claimed by Bodell from Bank One.

As demonstrated in Bank One's opening Memorandum, it is well settled that there can be but one satisfaction of a debt or obligation. Once an obligation is satisfied, no other claims may be brought on that obligation, including claims against third parties. The obligation is satisfied,

discharged and gone.

Bodell entered into a Settlement Agreement dated March 18, 2003 with Marc Jenson. Jenson paid Bodell $3 million pursuant to the Settlement Agreement, which was agreed to constitute a satisfaction of the Bodell loan. Therefore no further claims may be brought against Bank One or anyone else.

A. Bank One Seeks Reconsideration of Judge Bohling's Decision On This Issue.

Bank One noted in its opening brief that very early in this case, Bank One had brought this same argument based on accord and satisfaction as a summary judgment motion which was denied by the Honorable William Bohling. Bodell objects that Bank One did not bring a separate motion for reconsideration under Utah R. Civ. P. 54(b). Opp. at 12. Although Bank One did not invoke the rule by name, it was doing so in substance, and cited *Tremblay v. Mrs. Fields Cookies*, 884 P.2d 1306, 1311 (Utah Ct. App. 1994), a case which interprets rule 54(b) to allow reconsideration of a summary judgment decision on the grounds, *inter alia*, that the earlier decision was in error, which is the basis for this re-assertion of the accord and satisfaction argument. Bank One believes the law clearly favors its position and asks the Court to correct the earlier error.

B. Bodell Has Not Raised a Dispute of Material Fact.

Responding on the merits of Bank One's argument, Bodell has not raised any dispute of material fact but instead argues that the release contained in the Settlement Agreement is not a release of claims against Bank One as a matter of law. *See* Opp. at 13-19 (no issues of disputed fact are mentioned in the discussion of how to interpret the Settlement Agreement).

C. Bodell Confuses the Doctrine of Accord and Satisfaction with Release.

Bodell confuses two different legal doctrines and misconstrues Bank One's argument as relying on the release contained in the Settlement Agreement when in fact Bank One relies on the accord and satisfaction contained in the Settlement Agreement. Release is a different doctrine and concept and should not be confused with accord and satisfaction. A release excuses performance by a party. Accord and satisfaction extinguishes a claim.

Bodell argues that its release of claims against MSF and Jenson did not release claims against Bank One. In support of its argument, Bodell relies on Section 78-27-42 of the Utah Liability Reform Act which provides that "[a] release given by a person seeking recovery to one or more defendants does not discharge any other defendant unless the release so provides". UTAH CODE ANN. § 78-27-42. Opp. at 18. Bodell's reliance on the Liability Reform Act is misplaced and irrelevant to the issue presented by Bank One. Bank One does not argue that the release by Bodell of MSF and Jenson contained in the Settlement Agreement operates as a release of Bank One.[4] Rather, Bank One maintains that the Settlement Agreement constitutes an accord and satisfaction of the obligations owed to Bodell.

A release is a waiver of claims against a party. Black's Law Dictionary 1292 (7th ed. 1999) (A release is "the act of giving up a right or claim to the person against whom it could have been enforced"). An accord and satisfaction, on the other hand, "arises when the parties to a contract agree that a different performance, to be made in substitution of the performance

[4] Although Bank One's Motion for Summary Judgment does not assert that the release in the Settlement Agreement operates as a release of Bank One, Bank One maintains that such is the case and reserves the right to assert such position in the future.

originally agreed upon, will discharge the obligation created under the original agreement." *ProMax Dev. Corp. v. Raile*, 998 P2d 254, 259 (Utah 2000). The U.S. District Court for the Northern District of Illinois clearly explained the difference: "There are two different things: an accord and satisfaction is a contractual method of discharging a debt or claim by some performance other than that which was originally due; a release is a contract whereby a party abandons a claim or relinquishes a right that could be asserted against another." *Doyle's Construction & Remodeling, Inc. v. Wendy's International, Inc.*, 144 F.Supp. 2d 969, 976 (N.D. Ill. 2001). *See also, Thompson v. Nicholson*, 1994 WL 44428 *4 (Tenn. Ct. App. 1994) (Release and accord and satisfaction "differ from one another in that a release is a relinquishment by the creditor or holder of a right, and an accord and satisfaction is a discharge of a claim or demand by or for the debtor or person liable, by some means other than its full performance.").

An accord and satisfaction is similar to a novation. The Settlement Agreement replaces the obligations under the note. The Settlement Agreement expressly states that the loan obligations are "fully satisfied and repaid in full." The note is discharged by the Settlement Agreement. There is no longer any obligation owing on the note. If Jenson had failed to pay the $3,000,000.00 pursuant to the Settlement Agreement, Bodell's remedy would have been for breach of the Settlement Agreement, not to sue on the note. Upon reaching an accord and satisfaction, the note is gone. It is discharged.

D. The Settlement Agreement on its Face Establishes the Necessary Elements of Accord and Satisfaction.

The Settlement Agreement constitutes an accord and satisfaction because the full amount

owing under the Loan was not paid, but rather that it was "deemed" paid in full by Bodell. This is the very definition of an accord and satisfaction -- an agreement to give and accept some performance other than that which is actually due as full satisfaction of a claim or obligation. *See ProMax Dev. Corp. v. Raile*, 998 P.2d at 259. In Utah, the necessary elements to establish an accord and satisfaction are: "(1) an unliquidated claim or a bona fide dispute over the amount due; (2) a payment offered as full settlement of the entire dispute; and (3) an acceptance of the payment as full settlement of the dispute." *Id.* at 998 P.2d at 259 (citing *Marton Remodeling v. Jensen*, 706 P.2d 607, 609-10 (Utah 1985)). The Settlement Agreement establishes all of the necessary elements of an accord and satisfaction.

1. The Settlement Agreement Covers Both Liquidated and Unliquidated Claims.

Plaintiff argues that "even if the Settlement Agreement on its face had acknowledged full payment of the debt . . ., the Settlement Agreement still was not an accord and satisfaction even as to Bodell, MSF, and Jenson" because there was no unliquidated claim or bona fide dispute over the amount due. Opp. at 16. Plaintiff's statement is not an accurate characterization of the facts alleged in the Complaint or recited in the Settlement Agreement. Bodell had numerous claims against MSF and Jenson, both liquidated and unliquidated, in addition to the loan, which were resolved by the Settlement Agreement.[5]

Bodell's original Complaint, which predated the Settlement Agreement, alleges numerous actions by Jenson which, if true, would give rise to fraud and other claims against

[5] Bank One does not admit that the debt owing to Bodell by MSF and Jenson was undisputed but will not challenge that assertion for present purposes.

Jenson. Complaint, ¶¶ 12-16. The Settlement Agreement clearly and expressly provides that it is "a full settlement of all obligations, disputes and other matters between them, including but not limited to the Loans" (4th Whereas Clause, emphasis added), the release extends to all claims and "allegations of fraud", "whether known or unknown, suspected or unsuspected, liquidated or unliquidated ..., arising out of all past affiliations and transactions ... including, but not limited to, the Loans and all related arrangements and transactions", (¶ 2, emphasis added), "that the obligations of the MSF Parties in connection with the Loans, including all principal and interest that may have been deemed to have accrued thereon, are hereby deemed fully satisfied and repaid in full," ¶ 2 (emphasis added), and that the Settlement Agreement "is a mutual release of claims and that, following execution of [the Settlement Agreement], no Bodell Party shall have any claim against an MSF Party," *Id.* ¶ 5. Bodell acknowledges that the Settlement Agreement covers claims beyond the $4 million loan: "As the settlement documents demonstrate, the agreement resolved outstanding disputes between Jenson and Bodell relating to more than just the $4 million loan in August, 2000." Bodell's Memorandum in Opposition to Motion for Summary Judgment of Defendant Mark Robbins at xxxiv, ¶ 92. It is undisputedly clear and express that Bodell had claims against MSF and Jenson for fraud, as well as on the note and guarantee, that those fraud claims were unliquidated, that the Settlement Agreement was global and covered all liquidated and unliquidated claims, that there was "a full settlement of all obligations, disputes and other matters," and an accord and satisfaction.

Whether Jenson and MSF disputed that the loan was owing or what the amount owing under the loan is immaterial. In order to establish an accord and satisfaction in Utah, the law

requires, among other things, "an unliquidated claim or a bona fide dispute over the amount due." *ProMax*, 998 P.2d at 259 (citing *Marton Remodeling v. Jensen*, 706 P.2d 607, 609-10 (Utah 1985) (emphasis added). The Settlement Agreement is not merely a release of claims between Bodell, Jenson and MSF arising under the loan, but also settles all claims between the parties, including "allegations of fraud" and other claims "whether . . . liquidated or unliquidated."

2. An Offer of Payment in Full Satisfaction of the Claims was Offered by Jenson and MSF and Accepted by Bodell.

The second and third elements of accord and satisfaction are "(2) a payment offered as full settlement of the entire dispute; and (3) an acceptance of the payment as full settlement of the dispute." *ProMax*, 998 P.2d at 259. Bodell does not dispute that a payment was offered and accepted as full settlement of all disputes between Bodell and Jenson and MSF.

E. The Accord and Satisfaction Operates as a Legal Bar of Plaintiff's Claims Against Bank One.

Bodell next argues that even if an accord and satisfaction was reached as between Bodell, MSF and Jenson, that accord and satisfaction would not apply to Bank One because Bank One was not a party to the Settlement Agreement. Bodell suggests that, in the Settlement Agreement, there was no "intent to release . . . claims against third parties such as Bank One." Opp. at 15-16. Whether Bodell subjectively intended the Settlement Agreement to operate as an accord and satisfaction is irrelevant as a matter of law. *See e.g., Estate Landscape and Snow Removal Specialists, Inc. v. Mountain States Telephone and Telegraph Co* , 844 P.2d 322, 330 (Utah 1992) (stating that the doctrine of accord and satisfaction "does not require subjective intent to

discharge an obligation, provided the parties' actions give rise to a reasonable inference that they accepted the altered performance "), *Dishinger v Potter*, 47 P 3d 76 (Utah Ct App 2001) (holding that parties' subjective intent was "of no legal consequence" and that acceptance as full satisfaction was established by parties' conduct) The language of the Settlement Agreement is sufficient to establish an accord and satisfaction as a matter of law regardless of Bodell's subjective intent [6]

Bodell also relies on a case from the Bankruptcy Court in the District of Florida In *In re Dollar Time Group Inc*, 223 B R 237 (Bankr S D Fla 1998),[7] the Bankruptcy Court did precisely what Bodell is attempting to convince this Court to do – confuse the doctrine of accord and satisfaction with the doctrine of release The language quoted by Bodell in its brief clearly demonstrates this confusion In *Dollar Time Group*, the court stated that "[a]n accord and satisfaction cannot be reached between parties other than those who were party to the original contract or claim " *Id* at 248 (citation omitted) The court goes on to state that "[w]hile it is true that the Settlement Agreement did represent an accord to settle all claims between Dollar Time and Bargain the Agreement contained no expression of an intent to settle the claims between Dollar Time and [the defendants] individually ' *Id* The *Dollar Time* decision carelessly and improperly commingles the concept of release with accord and satisfaction Parties are not satisfied Rather, a debt or claim is satisfied A party is released not satisfied If there is an

[6] In its opening brief at 13, Bank One suggested that because the terms of the Settlement Agreement were clear, extrinsic evidence should not be considered Bodell suggests that Bank One cannot invoke the parole evidence rule because it was not a party to the agreement Opp at 15 n 7 Even if true, this point is insignificant because Bodell has not suggested that any material facts exist which would vary the terms of the written agreement Instead, Bodell argues from the text of the Settlement Agreement *See* Opp at 15-16

[7] This case was cited by Plaintiff as *Welt v Sasson* in its memorandum Opp at 16

accord and satisfaction of a debt, the obligation is gone and no further claims can be made against anyone. The court in *Dollar Time* provides no meaningful discussion of the elements and effect of an accord and satisfaction, and should be disregarded.

The law is well settled that there can be but one satisfaction of a debt or obligation. *See Harris-Dudley Plumbing Co. v. Professional United World Travel Assoc., Inc.*, 592 P.2d 586, 588 (Utah 1979); *Blodgett v. Zions First National Bank*, 752 P.2d 901, 903 (Utah Ct. App. 1988). It is equally well settled that this principle applies to tort claims. 1 AM. JUR. 2D *Accord and Satisfaction* § 12 (1994) (and cases cited therein) (An accord and satisfaction between a person injured and one of several co-tortfeasors responsible for the injury will discharge the other tortfeasors from further liability to the person injured).

Other cases have found that an accord and satisfaction bars claims against third parties who are not parties to the agreement creating the accord and satisfaction. In *Luxenburg v. Can-Tex Industries*, 257 N.W.2d 804 (Minn. 1977), the Court ruled, "if the injured party has accepted satisfaction in full for the injury suffered by him, the law will not permit him to recover again for the same injury . . . ." *Id.* at 807-808. In a footnote, the Court acknowledged that an amount less than the full damages may represent "full compensation" where the lesser amount reflects a discount due to the fact that liability is disputed. *See also Havard v. Kemper National Insurance Companies*, 945 F. Supp. 953 (D. Miss. 1995) (An accord and satisfaction between the insured and the insurer discharged all claims of plaintiff and therefore plaintiff's claims against appraisers were dismissed).

When an accord and satisfaction is reached, the debt is discharged by substitute

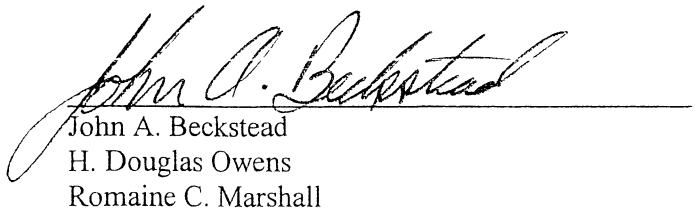
performance. It is not a question of what parties remain liable. The debt is gone. There can only be one satisfaction of an obligation. The Settlement Agreement satisfies the obligations on the loan and any tort claims. If the loan has been satisfied, whether by accord and satisfaction or otherwise, no damages are suffered. Since Bodell has no damages, it cannot make a claim against Bank One or anyone else.

CONCLUSION

For the foregoing reasons. summary judgment should be granted in favor of Bank One on both the fraud and negligent misrepresentation causes of action (as well as on the pending summary judgment motion of Bank One on the fraud claim), the Complaint dismissed upon the merits, and Bank One awarded its costs.

Dated this 31st day of August, 2007.

HOLLAND & HART LLP



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CERTIFICATE OF MAILING

I certify that on August 31st , 2007, I served a copy of the foregoing document to the following by:

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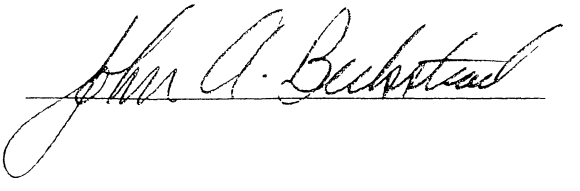

EXHIBIT A

COPY OF TRANSCRIPT

IN THE THIRD JUDICIAL DISTRICT COURT

IN AND FOR SALT LAKE COUNTY, STATE OF UTAH

BODELL CONSTRUCTION COMPANY, a Utah corporation, Plaintiff, vs. MARK H. ROBBINS; CHEROKEE & WALKER INVESTMENT COMPANY, L.L.C., a Utah limited liability company; CHEROKEE & WALKER, L.L.C., a Utah limited liability company; BANK ONE, UTAH, NATIONAL ASSOCIATION a national banking association, and DOES 1 through 50, Defendants.	Deposition of: GARY M. SCHWARTZ Civil No. 030917018 Judge John P. Kennedy

July 19, 2007 * 9:40 a.m.

Location: Burbidge & Mitchell
215 South State -- Suite 920
Salt Lake City, Utah

Reporter: Denise M. Thomas, CRR/RPR
Notary Public in and for the State of Utah

opinion on page 8, down at the bottom what I've marked 14, "It's my opinion, based upon my experience and expertise That individuals and businesses rely on these letters "

A. That's correct

Q. And then if you turn the page, what I've marked as 18 says, "It's my opinion that Bodell's reliance on this letter was consistent with the reliance placed by bank customers on specific correspondence."

A. That's correct.

Q. So would you agree that your opinion boils down to the idea that Bodell had the right to rely on the truthfulness of the letter?

A. I guess I don't understand your question

Q. Okay Well, do you have the opinion that his conduct in this case was reasonable in lending $4 million?

A. I don't have an opinion on that, no.

Q. Okay And in this opinion I've marked as 18 where it says it's my opinion Bodell's reliance was consistent with reliance placed by bank customers on specific correspondence, is it fair to say that, restated, that opinion is simply that he had a right to rely on the letter being true?

the letter

Q. And I just want to understand what you think those facts are.

A. Okay.

Q. And that would be, one, that a deposit was going to be made into an account belonging to MadTrax?

A. Right, that a deposit -- that MadTrax will be depositing $165 million into Bank One Utah, NA, the bank for which, or whose letterhead the letter was written, that the funding was coming from a loan agreement between MadTrax and -- or Arimex, excuse me, and that money will be deposited into an interest bearing account in the name of MadTrax and that money would be managed by Mr. Robbins and Mr. Jensen.

Those are the facts as I see them in this letter that I believe was reasonable for Mr. Bodell to rely upon.

Q. All right. And it wouldn't have been reasonable for him to rely on that any portion of the $165 million would be available to repay him, would it? That's not a fact stated in the letter?

A. That's correct.

MR SHELBY Whoa.

THE WITNESS: Sorry.

conclusion that he did not have a right to assume, based on this letter, he could be paid out of the $165 million?

MR SHELBY. Foundation.

THE WITNESS Based upon this letter, that would be correct

Q. (BY MR OWENS) Your answer is that my statement is correct, you are agreeing with me?

A. I am

MR. SHELBY: His answer is what his answer was.

MR OWENS: I'm trying to clarify it

MR. SHELBY: That question didn't clarify it. It just said you just answered my question

MR. OWENS: Well, thank you for helping me understand my ambiguity. I'll restate it.

Q. (BY MR. OWENS) So you are agreeing it would not be reasonable for Bodell to assume he could be repaid out of the $165 million based on the text of the letter?

A Based upon this letter, that is correct

Q Have you in your professional work seen any letters from a bank based on which millions of dollars were lent by a third party where the letter talks about money that will be in an account?

Tab 9

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IN THE THIRD DISTRICT COURT,

SALT LAKE COUNTY, STATE OF UTAH

BODELL CONSTRUCTION COMPANY, a Utah corporation, Plaintiff, v. MARK H. ROBBINS; CHEROKEE & WALKER INVESTMENT COMPANY, L.L.C., a Utah limited liability company; CHEROKEE AND WALKER, L.L.C., a Utah limited liability company; BANK ONE, UTAH, National Association, a Utah corporation; and DOES 1 through 50, Defendants.	**PLAINTIFF'S SUPPLEMENTAL MEMORANDUM REGARDING DEFENDANT BANK ONE'S REQUEST TO RECONSIDER THE PRIOR RULING ON ACCORD AND SATISFACTION** Civil No. 030917018 Judge John Paul Kennedy

Pursuant to the Court's direction at the hearing on September 10, 2007, Plaintiff Bodell Construction Company, Inc. ("Bodell") files this supplemental memorandum in further opposition to Defendant Bank One, Utah's ("Bank One") Motion for Summary Judgment. Specifically, this memorandum responds to the Court's request for briefing on its discretion to

reconsider Judge Bohling's denial of Bank One's prior motion for summary judgment on the issue of accord and satisfaction.

I. INTRODUCTION

On March 15, 2004, after extensive briefing and lengthy oral argument, Judge Bohling entered an Order denying Bank' One's Motion for Summary Judgment, joined in by Defendant Robbins, on the issue of accord and satisfaction. (A copy of the Order Denying Defendants' Motion for Summary Judgment and Granting Plaintiff's Rule 56(f) Motion to Continue C&W's Motion for Partial Summary Judgment to Permit Discovery (the "Order") is attached hereto as Exhibit A.) More than three years later and after hundreds of thousands of dollars of additional expense to the parties in discovery and motion practice, Bank One seeks reconsideration of the Order in its latest Motion for Summary Judgment, filed July 3, 2007. However, that request for reconsideration fails to recognize in any way that such motions to reconsider are disfavored under Utah law and remarkably does nothing more than rehash the very same arguments made previously by Bank One and rejected by Judge Bohling.

At the hearing on September 10, 2007, this Court asked the parties to brief whether the Court had the authority to reconsider Judge Bohling's Order and, if it did, whether it should do so. The short answer is that while the Court has such authority, it should not entertain reconsideration in these circumstances.

Motions to reconsider are discouraged by the Utah Supreme Court because they are wasteful of judicial resources. Indeed, such motions are treated with disfavor because otherwise losing parties would always seek a second bite at the apple. Under clear Utah case law, Utah courts typically deny motions to reconsider as inappropriate, especially where as here the requesting party fails to point to any extraordinary circumstance, error of law or new fact as

justification. Bank One's request for reconsideration should be rejected because motions to reconsider are generally not appropriate, because the request presents no new facts or law as a basis for reconsideration, and because Judge Bohling made no error.

II. MOTIONS FOR RECONSIDERATION ARE GENERALLY DISFAVORED AND THERE IS NO EXCEPTIONAL CIRCUMSTANCE IN THIS CASE TO WARRANT THE REQUESTED RECONSIDERATION.

Bank One's motion is remarkable for its complete failure to acknowledge the disfavor with which such motions for reconsideration are regarded by Utah courts. In *Salt Lake City Corp. v. James Constructors, Inc.*, 761 P.2d 42 (Utah Ct. App. 1988), the Utah Court of Appeals wrote:

> Once the judge has decided, the system assumes he or she has decided correctly and would decide the same way again. Reconsideration requests in that situation are frowned on. The occasional reversal on appeal is a price the system is pleased to bear in exchange for being free of the burden of reconsideration in the vast majority of cases where the correct result was reached and would be reached again on reconsideration, re-reconsideration, and consideration of the re-reconsideration.

Id. at 44. This disfavor is "particularly applicable when, in the case of summary judgment, a subsequent motion fails to present the case in a different light, such as when no new, material evidence is introduced." *Id.* at 45. Since Bank One's instant motion "fails to present the case in a different light," it should be denied. The Utah Supreme Court explained, "[a]lthough we have discouraged these motions, they have proliferated in civil actions to the extent that they have become the cheatgrass of the litigation landscape. *We acknowledge that the extraordinary circumstances may arise when it is appropriate to request a trial court to reconsider a ruling. These occasions are rare, however*, and we encourage attorneys to reverse the trend to make motions to reconsider routine." *Shipman v. Evans*, 100 P.3d 1151, 1155 n.5 (Utah 2004) (emphasis added). There is nothing in Bank One's motion to suggest that there is any

"extraordinary circumstance" here. Rather, Bank One candidly admits that the basis for its request for reconsideration is that it thinks Judge Bohling's ruling was "in error." (*Reply in Support of Bank One's Motion for Summary Judgment on Plaintiff's Fraud and Negligent Misrepresentation Claims* ("Reply Memorandum") at 9.) In other words, Bank One is simply unhappy with the result, something that is true for half of all litigants. For these reasons, the Court should deny the motion for reconsideration without further expenditure of judicial resources.

In its Reply Memorandum, Bank One recognizes that its initial motion did not specify under which procedural rule its request for reconsideration was made and asserts that its request comes under Utah R. Civ. P. 54(b), referencing *Tremblay v. Mrs. Fields Cookies,* 884 P.2d 1306, 1311 (Utah Ct. App. 1994). (*Reply Memorandum* at 9.) While Rule 54(b) does not specifically authorize motions for reconsideration, it does provide in relevant part that "any order or other form of decision, however designated, that adjudicates fewer than all the claims or the rights and liabilities of fewer than all the parties shall not terminate the action as to any of the claims or parties, and the order or other form of decision is subject to revision at any time before the entry of judgment adjudicating all the claims and the rights and liabilities of all the parties."

In *U.P.C., Inc. v. R.O.A. General, Inc.,* 990 P.2d 945, 958-59 (Utah 1999), the Utah Supreme Court addressed the issue of motions to reconsider in the context of Rule 54(b):

> We have interpreted Rule 54(b) to allow "a [trial] court to change its position with respect to any order or decision before a final judgment has been rendered in the case." *Tremblay v. Mrs. Fields Cookies,* 884 P.2d 1306, 1320 n. 2 (Utah Ct.App. 1994); *accord Timm v. Dewsnup,* 851 P.2d 1178, 1184-85 (Utah 1993)(permitting reconsideration of summary judgment under Rule 54(b) and holding summary judgment did not fully dispose of case when part of counterclaim remained in trial court, and was thus subject to revision); *Kennedy,* 600 P.2d at 536-37; *Salt Lake City Corp. v. James Constructors, Inc.,* 761 P.2d 403, 406 (Utah Ct. App. 1997)(stating "Rule 54(b) allows courts to readjust

> prior rulings in . . . cases . . . unless those rulings disposed entire claims or parties *and* those rulings were specifically certified as final").
>
> * * *
>
> However, a litigant seeking revision and reversal must demonstrate a reason for the request. *See id.* For instance, a litigant may show that : (1) the matter is presented in a "different light" or under "different circumstances;" (2) there has been a change in the governing law' (3) a party offers new evidence; (4) "manifest injustice" will result if the court does not reconsider the prior ruling; (5) a court needs to correct its own errors; or (6) an issue was inadequately briefed when first contemplated by the court.

In this case, Bank One makes no pretense of having new evidence or new law. It simply states that Judge Bohling's "earlier decision was in error." (*Reply Memorandum* at 9.) In other words, Bank One can point to no "different light" or "different circumstances," does not argue there has been a change in the governing law, does not offer new evidence, does not argue there will be "manifest injustice" if the court does not reconsider the prior ruling or that the issue was inadequately briefed the first time. Bank One just thinks that Judge Bohling got it wrong. This rationale for a motion to reconsider is exactly the kind of rationale that most litigants advance when pursuing motions to reconsider, and is the reason such motions are disfavored; otherwise, every losing litigant would seek reconsideration and the litigation process would be endless.

In this case, moreover, there would be manifest injustice if the Court were to reconsider this ruling after three years and all the litigation effort and expense of the parties. Bank One was free to seek reconsideration from Judge Bohling after his Order in 2004, but it did not. It waited until the end of discovery and the eve of trial to seek reconsideration. If there really was error, Bank One should have sought to point it out to Judge Bohling in 2004.

III. JUDGE BOHLING DID NOT ERR IN HIS PRIOR RULING.

The crux of Bank One's request for reconsideration is its assertion that Judge Bohling's decision was "in error." We have attached hereto as Exhibit C, for the Court's convenience, the section of Bodell Construction Company's Memorandum in Opposition to Bank One's Motion for Summary Judgment addressing Bank One's request for reconsideration of the prior ruling on accord and satisfaction. However, there are several points to emphasize based on the arguments made by Bank One at the hearing on September 10, 2007.

First, Bank One argues that the Settlement Agreement between Bodell and former defendant Marc Jenson was an accord and satisfaction and not a release. However, even a cursory review of the Settlement Agreement (Ex. B), reveals that it was a release of Jenson only. Paragraph 2(a) contains a release by Bodell of Jenson and his company, MSF Properties, L.C. Paragraph 3 contains a release of Bodell by Jenson and MSF. The words in Paragraph 2(b) on which Bank One focuses do not change the clear character of the Settlement Agreement as a release.

Second, Bank One disputes Judge Bohling's conclusion that "at issue is a liquidated debt for which less than the outstanding balance was accepted in the settlement agreement with the Jenson parties. Accordingly, no 'accord and satisfaction' was reached between Plaintiff Bodell on the one hand and the Jenson parties on the other." Order at 2 (Ex. A). At the hearing, Bank One argued that the parties were not settling a "liquidated debt" because the Settlement Agreement says "the parties now desire to achieve a full settlement of all obligations, disputes and other matters outstanding between them, including, but not limited to the Loans." Settlement Agreement at 1 (Ex. B). Bank One also argues that because the release language in Paragraph 2(a) of the Settlement Agreement was broad, referencing release of claims "of

whatsoever kind and nature," the Settlement Agreement went beyond settlement of the specific claims on the Loans. However, these arguments seek to give a meaning to the broad language of a release without recognize the reality, which is that the only actual claims of Bodell against Jenson and MSF, as made clear in the complaint against them in this case, related to the Loans themselves. Indeed, Bank One does not suggest that Bodell had actual claims against Jenson or MSF other than on the Loans, as defined in the Settlement Agreement. Thus, the undisputed reality of the Settlement Agreement is that it was settling a liquidated amount.

Third, Judge Bohling also held that "the Court is further not persuaded that an accord and satisfaction operates for the benefit of third parties unless said third parties are specifically referenced in the agreement." Order at 2 (Ex. A). It is undisputed that the Settlement Agreement does not reference Bank One, or Defendant Robbins for that matter, and that required a payment of less than the full amount of Bodell's loss. Bank One's arguments now are the same ones it made to Judge Bohling that were rejected by him. There is good reason for rejecting Bank One's argument on this score. The law encourages settlements, and for Bank One to be able to escape liability based on a settlement with a different defendant where it was not mentioned and where the settlement was less than the claimed loss would defeat that purpose. It is for that reason that the Utah Liability Reform Act, Section 78-27-42, provides that "[a] release given by a person seeking recovery to one or more defendants does not discharge any other defendant unless the release so provides." *See Child v. Newsome,* 892 P.2d 9, 11 (Utah 1995) (explaining that the purpose of this section of the Act was to reverse the common law rule that a release of one tort-feasor also released all other tort-feasors).

In its Reply Memorandum, Bank One contends that the doctrine of accord and satisfaction applies to tort claims and cites 1 Am. Jur. 2d Accord and Satisfaction § 12 as support

for that notion (Reply Memorandum at 16) However, Bank One omits the most applicable portion of that provision, which provides

> [I]f an injured party receives a part of damages from one co-tortfeasor, and receipt of that part is not understood to constitute a full satisfaction of the injury, the injured party does not thereby discharge the others from liability *The latter transaction is in the nature of a release, reserving the right to sue the other tortfeasors, or a covenant or agreement not to sue the tortfeasor from whom the partial satisfaction was received*

(emphasis added) Given that Bodell did not specifically release any parties other than Jenson, the Settlement Agreement is in the nature of a release and does not discharge claims against other parties who were not named in and were not parties to the Settlement Agreement

For these reasons, even if the Court were to reconsider Judge Bohling's ruling, it should confirm it

IV. CONCLUSION

For the reasons stated above, Plaintiff's Motion for Reconsideration should be denied

DATED this 17th day of September, 2007.

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CERTIFICATE OF SERVICE

I certify that a true and correct copy of the foregoing **PLAINTIFF'S SUPPLEMENTAL MEMORANDUM REGARDING MOTIONS TO RECONSIDER** was sent via mail, postage prepaid and email on this 17th day of September, 2007 to the following:

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IN THE THIRD JUDICIAL DISTRICT COURT
IN AND FOR SALT LAKE COUNTY, STATE OF UTAH

BODELL CONSTRUCTION COMPANY, a Utah corporation, Plaintiff, v. MARK H. ROBBINS; CHEROKEE & WALKER INVESTMENT COMPANY, L.L.C., a Utah limited liability company; CHEROKEE & WALKER, L.L.C., a Utah limited liability company; BANK ONE, UTAH, NATIONAL ASSOCIATION, a national banking association, and DOES 1 through 50, Defendant.	**BANK ONE'S SUPPLEMENTAL MEMORANDUM REGARDING THE COURT'S AUTHORITY TO RECONSIDER THE PRIOR RULING ON ACCORD AND SATISFACTION** Civil No. 030917018 Judge John P. Kennedy

Defendant JPMorgan Chase Bank, N.A., as successor by merger to Bank One, N.A. ("Bank One"), respectfully submits this Supplemental Memorandum Regarding The Court's Authority to Reconsider The Prior Ruling on Accord and Satisfaction. This brief was requested by the Court at the motions hearing September 10, 2007.

I. THE COURT HAS AUTHORITY TO RECONSIDER JUDGE BOHLING'S ORDER.

The Court has authority to reconsider Judge Bohling's decision denying Bank One's earlier motion for summary judgment based on accord and satisfaction. A court has inherent authority to revise or correct any order before entry of final judgment. Additionally, the rules specifically grant such authority. *See Utah R. Civ. P. 54(b)* (order that adjudicates fewer than all claims "is subject to revision at any time before the entry of judgment adjudicating all the claims of all the parties"); *Tremblay v. Mrs. Fields Cookies*, 884 P.2d 1306, 1320 n. 2 (Utah Ct. App. 1994) (Rule 54(b) allows trial court "to change its position with respect to any order or decision before a final judgment has been rendered in the case"); *U.P.C., Inc. v. R.O.A. General, Inc.*, 990 F.3d 945, 958-59 (Utah 1999) (*same*, quoting *Tremblay*). Plaintiff admits the Court has the requisite authority. Plaintiff's Supplemental Memorandum at 2 ("while the Court has such authority . . .").

Bank One believes Judge Bohling's earlier decision is in error. The correction of error has specifically been held to be grounds for bringing a motion to reconsider. *See U.P.C., Inc.*, 990 P.2d at 959 ("a litigant seeking revision and reversal must demonstrate a reason for the request. For instance, a litigant may show that . . . (5) a court needs to correct its own errors") (internal citation omitted).

Plaintiff claims there would be manifest injustice because three years have passed since the decision and the parties have incurred additional expense. Plaintiff's Supplemental Memorandum at 5. Manifest injustice does not occur when an error is corrected. Quite the

contrary; the presumption is that correcting an error serves the ends of justice. This is as true of errors corrected by trial courts as it is for errors corrected much later on appeal.

Additionally, waiting to revisit an issue until discovery is completed makes sense where discovery may lead to evidence that is relevant to the issue. For example, Plaintiffs might have contended that extrinsic evidence weighed in favor of construing the settlement agreement as something other than an accord and satisfaction. As it turns out, discovery did not disclose any evidence that would change the summary judgment arguments. However, because discovery might have produced evidence relevant to the accord and satisfaction issue, it was appropriate to wait until the close of discovery to request reconsideration.

It also makes sense to reconsider the motion at this point because Bank One filed a motion for summary judgment based on six other arguments. While the Court is already examining the case in detail, the motion to reconsider does not waste judicial resources and should not be disfavored.

II. THE PRIOR RULING IS IN ERROR.

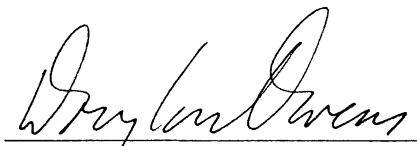
The Court directed the parties to brief its authority to reconsider the previous decision. The Court specifically clarified that it was not requesting any re-briefing of the merits of the parties' arguments. Bank One therefore attaches at Exhibit A the portion of its prior Reply in Support of Motion for Summary Judgment bearing on the merits of the argument. Plaintiff's re-briefing of the merits does not present any new argument. Plaintiff's Supplemental Memorandum at 6-8.

CONCLUSION

For the foregoing reasons, Bank One respectfully requests the Court to reconsider the earlier ruling denying summary judgment based on the doctrine of accord and satisfaction, and to grant summary judgment in its favor on that issue.

Dated this 26 day of September, 2007.

HOLLAND & HART LLP



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CERTIFICATE OF MAILING

I certify that on September 26th, 2007, I served a copy of the foregoing document to the following by:

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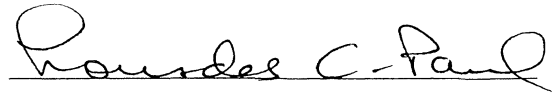

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